314 U.S. 62 (76)

JUL 26 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES AND GERTRUDE AMES,
HUSBAND AND WIFE,
Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

SIMEON E. SHEFFEY,
HERMAN WEINBERGER,
Counsel for Petitioners.

RICHARD BELCHER,
Of Counsel.

INDEX.

Subject Index.

	Page
Jurisdictional statement	1
Petition for a writ of certiorari	5
Summary and short statement of the matter involved in this case	5
Title to the Ames land	6
Title to mining claims	7
Petitioner's contentions	8
Respondent's contentions	8
Petitioner's answer to respondent's contentions is this	8
Reasons relied on for the issuance of the writ	10
Defendant's Exhibit "A-1"—Map of Pennsylvania—Jefferson Developments	12
Brief in support of petition	13
Opinion of court below	13
Jurisdiction	13
Statement of case	14
Specification of errors	14
Argument	15
1. Summary	15
2. The grant to the railway company was a grant in praesenti and passed title on the effective date of the granting act	16
3. The grant to the railway company was a grant of all the estate and title of the United States in the Ames land which was a common-law fee	18
4. The patent to the Ames land, when issued to the railway company, conclusively determined that the Ames land was non-mineral and not within the exception of the granting act	20

Page

5. Title to the school land in Section 16 vested as common-law fee in the State of California upon the filing of the township and section survey in the land office 29
6. The title of respondent's Pennsylvania claim had its inception under the Act of May 10, 1872 (17 Stat. A. L. 91). This act limited the length of claims to 1,500 feet 30
7. The burden of proving the right to mine under petitioners' land rested upon respondent. Respondent sought to show a senior title. The evidence respondent produced in this regard was largely inadmissible, being hearsay and self-serving declarations and failed entirely to prove the issue 31
8. Respondent's evidence of location 33
9. Ruling of the California Supreme Court on the evidence 42
10. Respondent's Jefferson claim 44

TABLE OF AUTHORITIES CITED.

Allen v. *Halstead*, 39 Tex. Civ. Ap. 324, 87 S. W. 754 41
Amador-Medean v. *South Spring Hill*, 36 Fed. 668 24
Ames et al. v. *Empire Star Mines, Ltd., et al.*, 17 A. C. 228, 2 Cal. Dec. 151 13
Bank of England v. *Anderson*, 4 Scott 83 41
Barden v. *N. P. R. R. Co.*, 154 U. S. 288 22
Biddle Boggs v. *Merced M. Co.*, 14 Cal. 279, 374 26
Black v. *Elkhorn M. Co.*, 52 Fed. 859, 860 26
Burke v. *S. P. R. R. Co.*, 234 U. S. 669 ..... 3, 19, 20, 21, 23, 25
Castillero v. *United States*, 67 U. S. (2 Black) 17 26
Champion Mining Co. v. *Mining Co.*, 75 Cal. 78 38
Cooper v. *Roberts*, 18 How. 173 29
Coulter v. *Pool*, 187 Cal. 181, 186 40
Daggett v. *Yreka Mining Co.*, 149 Cal. 357 ..... 33, 42
Dahler v. *All Persons*, 163 Cal. 160 36

Page

Deseret Salt Co. v. *Tarpey*, 142 U. S. 241 ..... 3, 17, 18
Driskill v. *Rebbe* (S. Dak. 1908), 117 N. W. 135 38
Frasher v. *O'Connor*, 115 U. S. 102 29
Gale v. *Best*, 78 Cal. 235 22
Jatunn v. *Smith*, 95 Cal. 154 17
Kent v. *Snyder*, 30 Cal. 666 44
Lacrabere v. *Wise*, 141 Cal. 554, 556 35
Lee Doon v. *Tesh*, 68 Cal. 43 26
N. Pac. R. R. Co. v. *Sanders*, 166 U. S. 620 22
People v. *Newell*, 192 Cal. 659 44
Pralus v. *Jefferson G. & S. M. Co.*, 34 Cal. 558 32
Roe v. *Strong*, 107 N. Y. 350 41
Silverbow M. & M. Co. v. *Clarke* (5 Mont. 378), 5 Pac. 570, 573 26
Smelting Co. v. *Kemp*, 104 U. S. 636, 640-41 ..... 21, 38
State v. *Moy Looke*, 7 Ore. 54 41
Tappan v. *Beardsley*, 77 U. S. (10 Wall.) 427, 434 36
Vore v. *Ephraim*, 173 Cal. 245, 248 22
West v. *Standard Oil Co.*, 278 U. S. 200, 211 ..... 3, 20
Williams v. *Santa Clara Mining Assn.*, 66 Cal. 193, 198 33
Wisconsin v. *Price*, 133 U. S. 496 ..... 3, 16

STATUTES AND AUTHORITIES CITED.

Act of July 25, 1866 (14 Stat. A. L. 239) 2, 10, 16
Act of July 26, 1866 (14 Stat. A. L. 251), 2, 10, 14, 25, 26, 27, 28
Act of May 10, 1872 (17 Stat. A. L. 91) 4, 9, 11, 14, 27, 28
California Code of Civil Procedure:
Section 1894 35
Section 1918 40
Section 1919 ..... 35, 36
Section 1936 41
Section 2009 35
Constitution of the United States, Article IV, Sec. 3, Sub. 2 10
Judicial Code, Section 237(b) (28 U. S. C. A. 344) 1
Corpus Juris:
Volume 22, p. 220 34
p. 428 36
Volume 46, p. 922 40

	Page
Lindley, Mines (3rd Edition):	
Section 41	26
Section 154	18
Section 161	22
Section 176	33
Section 272	33
Section 582	30
Section 783	38
Wigmore on Evidence (2d edition), Section 1572	36

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES AND GERTRUDE AMES,
HUSBAND AND WIFE,

Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD.,

Respondent.

JURISDICTIONAL STATEMENT.

---

1. The law believed to sustain the jurisdiction of the petition herewith presented is Section 237 (b) Judicial Code (28 U. S. C. A. Sec. 344), the pertinent provisions applicable to said petition reading:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of the state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States; and the

power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

2. The judgment sought to be reviewed by the petition herein was rendered by the Supreme Court of the State of California January 31, 1941 (17 A. C. 228), and a rehearing denied by said Supreme Court February 27, 1941, and the time for the filing of the petition herein was extended by order of this Court to the 26th day of July, 1941.

3. The decision sought to be reviewed involves a question of extralateral rights asserted by respondent in an ore vein apexing in respondent's claims, which lie outside of petitioners' land, and dipping under the surface of petitioners' land. Petitioners' land was granted to the California and Oregon Railway Company by the United States by act of Congress of July 25, 1866 (14 Stat. A. L. 239), and the grant to said land was confirmed by patent under date of June 14, 1880 (R. 208). Respondent's mining claims lie without the surface boundaries of petitioners' land. Their title is deraigned from the United States under acts of Congress, the first of such acts being the act of July 26, 1866 (14 Stat. A. L. 251). The rights of the parties depend upon the seniority of their respective titles. Each party claims senior title. Petitioners contend that their title is a common law fee with all surface and subsurface rights of such estate, which was granted to the railway company as of July 25, 1866; that respondent's title cannot be senior to this title because the first act of Congress authorizing the disposal of mineral lands as such is the act of July 26, 1866 (14 Stat. A. L. 251). The California Supreme Court held, in its decision herein sought to be reviewed, that title did not pass to the railway company until patent therefor was issued on June 14, 1880, saying (17 A. C. 234):

"In the present case there was no final and definite location of the Ames Tract by the railroad until the

> securing of the patent in 1880. Under the act of July 25, 1866, it had merely a 'floating grant' whereby it might secure title to the land on which it subsequently located."

This ruling is directly contrary to the ruling of this Court in many cases. See,

Wisconsin v. *Price*, 133 U. S. 496;
Deseret Salt Co. v. *Tarpey*, 142 U. S. 241.

Such ruling of the California Supreme Court is also contrary to those cases decided by this Court holding that a patent is a conclusive determination that the land so patented is not mineral land within the mineral exception contained in grants in aid of railroad construction.

Wisconsin v. *Price*, 133 U. S. 496;
Burke v. *Southern Pacific R. R. Co.*, 234 U. S. 669;
West v. *Standard Oil Co.*, 278 U. S. 200.

4. The decision of the California Supreme Court, if allowed to stand, is a decision contrary to the decisions of this Court without exception and will cast a cloud upon the title of all grants made to railroads in aid of their construction and will subject patents to such grants to collateral attack.

5. The grounds above set forth were raised before the California courts at every stage of the proceedings before said courts and were the basis upon which petitioners sought to enjoin respondent from mining under the surface of their land. Said grounds were raised in petitioners' pleadings before said California courts, in the introduction of the evidence at the trial of the case and were fully presented by briefs and arguments before all of said courts. The said courts ruled contrary to the position taken by petitioners with reference thereto, as above set forth.

6. The California Supreme Court held that title did not pass to the railroad company until it secured its patent on

June 14, 1880 (17 A. C. 228, 234), and then that title to the surface only of said lands passed; that title to the subsurface of said lands remained in the United States and that mining claims located on the public domain prior to and subsequent to such patent acquired extralateral rights in the land of petitioners.

7. The California Supreme Court held that a claim patented under the act of May 10, 1872 (17 Stat. A. L. 91) of more than 1500 feet in length had extralateral rights; that locations of mining claims on the public domain could be proved by evidence and that said locations were proved by evidence that was insufficient for such purpose.

Petitioners respectfully submit that this petition and the matters set forth therein are within the jurisdiction of this Court.

Dated San Francisco, California, July 26, 1941.

SIMEON E. SHEFFEY,
HERMAN WEINBERGER,
Attorneys for Petitioners.
RICHARD BELCHER,
Of Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES AND GERTRUDE AMES, HUSBAND AND WIFE,

Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the above named petitioners respectfully shows to this Honorable Court:

I.

Summary and Short Statement of the Matter Involved in This Case.

The controversy between petitioners and respondent depends upon the seniority of their respective titles. Each claims a senior title. Petitioners are the owners of the

Southwest quarter (SW¼) of Section 15, Township 16, Range 5 East, M. D. B. and M., Yuba County, California. Petitioners' land will be hereinafter referred to as "The Ames Land." Respondent is in possession of and operating two certain mining claims known as the Pennsylvania Claim and the Jefferson Claim, situated in Section 16 of the township above stated. The lode, or vein, upon which said mining claims are located, has a north and south strike, with an easterly dip. This vein, on its dip, passes under the Ames land. Respondent, contrary to the consent of petitioners, is mining this vein under the surface boundaries of the Ames land.

Respondent's land is two mining claims, (1) the Pennsylvania, patented, and, (2) the Jefferson, held by location, both situated in the Southeast quarter (SE¼) of Section 16 of the above township. Both claims are the same width (approximately 400 feet), the side lines of the one being a continuation of the side lines of the other. The Pennsylvania claim is 1540 feet in length, and the Jefferson is about 520 feet. The claims are located on a vein striking north and south and dipping easterly. The side lines of the claims are approximately parallel with the line running north and south between sections 15 and 16. Section 16 is a school section. The mining claims and the Ames land are not contiguous, there being the strip of school land approximately 200 feet wide lying between the easterly side line of the mining claims and the westerly line of Section 15. A diagram of lands is attached hereto.

Title to the Ames Land.

Section 15, above described, was granted to the California and Oregon Railway Company by Congress July 25, 1866 (14 Stat. A. L. 239). The lands so granted were succeeded to by the Central Pacific Railway Company. The railroad was built from Roseville, California, north, and, as to 77.6

miles, the map showing the completed railroad was filed in the United States Land Office July 27, 1870 (R. 191). This portion of the road extended beyond the Ames land and was the portion by the construction of which the Ames land was earned. The section and township survey was filed in the United States Land Office August 6, 1867, and approved November 21, 1867 (R. 115).

On June 14, 1880, a patent was issued by the United States to the Central Pacific Railway Company for land including the portions of Section 15, wherein lies the Ames land (R. 208). By mesne conveyance, on April 15, 1914, petitioners acquired said Ames land (R. 212-213-214).

Title to Mining Claims.

Pennsylvania:

A patent to the Pennsylvania mining claim was issued August 18, 1880 (R. 254-257). The application for patent is dated January 22, 1880, and was filed May 31, 1880 (R. 218-221). Respondent contended that this claim was located under miners' rules and regulations prior to 1863, and that its title related back to such location.

Jefferson:

The Jefferson claim is unpatented and held by location. The earliest location to which respondent attaches its title in this claim is the F. W. Johnson location, dated June 4, 1891 (R. 260).

Both parties hereto agree that their respective rights depend upon seniority of title, but each claims senior title.

Respondent's mining activities under the surface of the Ames land were begun subsequent to May 6, 1935, under an agreement of this date, a copy of which is defendant's Exhibit C in the record (R. 262). Prior to re-

spondent's mining a great many years had elapsed since any mining had been done on either of respondent's claims. See testimony of respondent's witness F. W. Johnson (R. 121-122, 124, 125).

Petitioners' Contentions.

Petitioners contend that the date of the inception of their title in private ownership is July 25, 1866, the effective date of the granting act (14 Stat. A. L. 239). That the grant was *in praesenti.* That the grant conveyed a common law fee with all surface and subsurface rights of a common law fee; that when the patent was issued June 14, 1880, the grant of July 25, 1866, was confirmed and thereby it was determined conclusively that the Ames land was not mineral land and not within the mineral land exception of the granting act.

Respondent's Contentions.

Respondent contends that both of its claims were located under miners' rules and regulations prior to 1863; that under such miners' rules and regulations, and by virtue of such locations, extralateral rights were acquired; that by such locations the vein was carved out extralaterally throughout its dip from all overlying lands except the mining claims; that by such locations there was attached forever to said claims extralateral rights; that the grant by the United States to the railway company did not affect these rights, asserted under miners' rules and regulations.

Petitioners' Answer to Respondent's Contentions is This:

That under the Constitution of the United States, only Congress may grant rights in the public domain; that prior to the first act of Congress (July 26, 1866) (14 Stat. A. L. 251), providing for the disposal of mineral lands, miners

on the public domain were trespassers, and had no rights except as among themselves; that neither the title of the United States nor its grantee in the public domain was in any way affected by locations under miners' rules and regulations prior to July 26, 1866. That on July 25, 1866, the United States could and did grant to the railway company the Ames land; that the grant was the grant of a common law fee, confirmed by patent on June 14, 1880.

That title to the school land in Section 16, a portion of which lies between petitioners' land and respondent's, vested in the State of California before any rights were acquired in the mining claims and was also a common law fee.

That respondent failed to prove any locations prior to the Act of Congress of May 10, 1872 (17 Stat. A. L. 91).

Petitioners herein filed an action in the Superior Court of the State of California, in and for the County of Yuba, entitled "Worthington Ames and Gertrude Ames, husband and wife, plaintiffs, vs. Empire Star Mines Company, Ltd., First Doe, Second Doe and Third Doe, defendants." In said action plaintiffs therein were seeking to enjoin defendants from mining under the surface of their said land and also seeking to recover damage for mining theretofore done. The matter of respondent's right to mine under petitioners' land was tried before said Superior Court, which rendered a judgment therein against petitioners herein. The issue of damages was deferred by stipulation of the parties until the first issue was finally disposed of. A copy of said judgment is page 20 of the record. An appeal was duly taken from said judgment to the Supreme Court of the State of California, which court affirmed the judgment of the trial court; thereafter a petition for rehearing was made to said Supreme Court and was denied February 27, 1941.

II.

Reasons Relied On for the Issuance of the Writ.

The Supreme Court of California (17 A. C. 228) *has decided a Federal question of substance relating to the effect of a Federal grant of lands in the public domain in a way not in accord with the applicable decisions of this court, but as a matter of fact in direct conflict therewith, as follows:*

A.

A railway grant in terms "there is hereby granted", is a grant *in praesenti.* Petitioners' land was thus granted July 25, 1866 (14 Stat. A. L. 239) and confirmed by patent June 14, 1880. Such grant is a grant of a common law fee.

The decision of the California Supreme Court is contrary to the foregoing established principle. Note particularly the language of the court (17 A. C. 234):

> "In the present case there was no final and definite location of the Ames Tract by the railroad until the securing of the patent in 1880. Under the act of July 25, 1866, it had merely a 'floating grant' whereby it might secure title to land on which it subsequently located. When the Ames Tract was finally and definitely located in 1880 its subsurface not only was known to be mineral but was subject to the vested extralateral rights of the adjoining mines."

B.

Rights in the United States public domain can be granted only by Congress (U. S. Const. Art. IV, Sec. 3, Sub. 2). The first act of Congress authorizing the disposal of Mineral land was passed July 26, 1866 (14 Stat. A. L. 251). Congress, having granted to the railway company petitioners' land on July 25, 1866, it could not thereafter grant rights in the same land to someone else.

The decision of the California Supreme Court is contrary to the foregoing established principle. Note particularly the language of the court (17 A. C. 234):

"The subsurface of the Ames Tract being clearly mineral could not pass under the terms of the act but remained in the government, and the Pennsylvania and Jefferson mines received full extralateral rights to mine therein by virtue of the Mining Act of July 26, 1866."

C.

THE DECISION OF THE CALIFORNIA SUPREME COURT HOLDS:

1. That the grant here involved in aid of railway construction did not pass title until the patent was issued and that the patent, when issued, passed surface rights only;

2. That miners, under their rules and regulations prior to the first mining act of Congress of July 26, 1866, could acquire vested rights in the public domain which would defeat the effect of a grant by Congress;

3. That the first mining act of Congress automatically granted rights in public domain to miners thereon in their respective claims that took precedence over prior grants of Congress;

4. That in 1880 miners could acquire rights under the mining statutes of 1866, though the latter act was expressly repealed by the mining statute of 1872 (17 Stat. A. L. 91).

5. That hearsay evidence is admissible to prove location under miners' rules and regulations, contrary to the previous decisions of the said Supreme Court and of this court.

6. That locations under miners' rules and regulations were proved by evidence which was totally insufficient.

Thus, the California Supreme Court has rendered a decision on the effect of a Federal grant, the result of which, as stated by Mr. Justice Carter in his dissenting opinion (17 A. C. 241) *is as follows:*

"The conclusion reached in the majority opinion not only renders insecure and subject to collateral attack every railroad patent in this state, but it places the

same cloud upon every agricultural patent which has been issued within the last seventy-five years."

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of this Honorable Court, directed to the Supreme Court of the State of California, commanding said court to certify and send to this Court for its review and determination, at a date to be therein designated, a complete transcript of all of the proceedings in said Supreme Court of the State of California in said cause, entitled Worthington Ames and Gertrude Ames, husband and wife, plaintiffs and appellants, vs. Empire Star Mines Company, Ltd., First Doe, Second Doe and Third Doe, defendants and respondents, Sacramento No. 5246, in the records of said Supreme Court and that the judgment decree of said Supreme Court in said cause be reversed by this Honorable Court and that your petitioners have such other and further relief as to this Honorable Court may seem meet and the nature of the case require, and so your petitioners will ever pray.

Dated: San Francisco, California, July 26, 1941.

SIMEON E. SHEFFEY,
HERMAN WEINBERGER,
Attorneys for Petitioners.

RICHARD BELCHER,
Of Counsel for Petitioners.

Certificate of Counsel.

I hereby certify that I am one of the attorneys for the petitioners in the above entitled case, and that in my judgment the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated: San Francisco, California, July 12, 1941.

SIMEON E. SHEFFEY,
Attorney for Petitioners.

(Here follows Defendant's Exhibit A-1.)

MAP

PENNSYLVANIA-JEFFERSON DEVELOPMENTS

BROWNS VALLEY

CALIFORNIA

1907

PENNSYLVANIA

JEFFERSON

AMES TRACT

DEFENDANT'S EXHIBIT 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES AND GERTRUDE AMES,
HUSBAND AND WIFE,

Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

I.

Opinion of the Court Below.

OPINION OF THE CALIFORNIA SUPREME COURT RENDERED JANUARY 31, 1941, *Worthington Ames and Gertrude Ames, Husband and Wife, Plaintiffs and Appellants,* v. *Empire Star Mines Company, Ltd., et al., Respondent* (17 A. C. 228, 2 Cal. Dec. 151).

II.

Jurisdiction.

THE QUESTION OF FEDERAL LAW BELIEVED TO SUSTAIN JURISDICTION OF THIS PETITION IS SET FORTH IN A JURISDICTIONAL STATEMENT FILED HEREWITH.

III.

Statement of Case.

SUCH STATEMENT IS SET FORTH IN THE PETITION FILED HEREWITH (pp. 5-9) AND, THEREFORE, IS NOT REPEATED HERE.

IV.

Specification of Errors.

THE CALIFORNIA SUPREME COURT ERRED IN HOLDING:

1. That title to lands granted to a railway company in aid of railroad construction did not pass title until the patent was issued, and then that title to the surface only passed. This is contrary to the uniform decisions of the United States Supreme Court;

2. That when the patent was issued in the case here involved to the railway company that this did not conclusively determine that the Ames land was non-mineral. This is contrary to the holding of the United States Supreme Court;

3. That the patent, when issued to the railway company, did not relate back to the date of the Congressional grant, thereby confirming title in a common law fee as of July 25, 1866;

4. That extralateral rights could be acquired under the Mining Act of Congress of July 26, 1866 (14 Stat. A. L. 251) in lands which had previously been granted to the railway company and later confirmed to the railway company by patent;

5. That extralateral rights were acquired under the Act of May 10, 1872 (17 Stat. A. L. 91) in a claim which exceeded 1500 feet in length;

6. That a mining claim patented under the Act of May 10, 1872, acquired extralateral rights in lands previously granted to the State of California as school lands;

7. That evidence inadmissible according to the general rules of evidence and insufficient for that purpose proved the location of mining claims under miners' rules and regulations, and United States statutes.

V.

ARGUMENT.

1. Summary.

A summary of the argument herein presented setting forth petitioners' position cannot be better stated than was stated by Mr. Justice Carter in his dissenting opinion (17 A. C. 271):

> "The Railroad Grant Act of July 25, 1866, created a present grant of nonmineral land to the railroad company; that is, the grant took effect as of that date, if and when the railroad company complied with the provisions of the act with reference to the location and construction of a railroad and filed its map of location with the General Land Office. The grant of such land remained a float until the filing of such map, and title thereupon vested in the railroad company subject to the determination by the General Land Office as to whether or not said land was mineral or nonmineral in character. If the land Office determined that any of the land covered by the grant was mineral in character, the same was excluded from the grant, and the railroad company was given other nonmineral land in lieu of the mineral land so excluded. If the Land Office determined that the land covered by the grant was nonmineral, and a patent was issued to the railroad company, the issuance of such patent conclusively determined the nonmineral character of the land, and the railroad company got a common law fee in land

granted, including all mineral deposited therein. Unless discovery of mineral in paying quantities was called to the attention of the government officials before patent was issued to the railroad company, all claims to the mineral in such land was cut off by the issuance of such patent. The provision in a patent issued to a railroad company excepting mineral or mineral land from the grant was and is void, and the railroad company was granted a common law fee including all mineral deposits in the land upon the issuance of the patent.

"A valid mineral location gives to the locator the right to follow extralaterally on their dip downward all veins apexing on his claim which penetrate other mineral lands, but extralateral rights do not exist in agricultural or nonmineral lands.

"When the Land Office determined the Ames Tract was nonmineral in character and the government issued a patent thereto to the railroad company, the latter was granted a common law fee in said land which related back to the date of the passage of the Railroad Grant Act of July 25, 1866, and cut off all intervening rights of those asserting that said land was more valuable for mineral than nonmineral purposes. The defendant therefore is barred from asserting the right to extract mineral from the Ames Tract upon the theory that it may do so under the extralateral right doctrine."

2. The grant to the railway company was a grant in praesenti, and passed title on the effective date of the granting act.

The granting act (14 Stat. A. L. 239), Section 2, reads:

"That there be, and hereby is granted, etc."

This constituted an immediate grant of the land to the railway company.

Wisconsin v. *Price*, 133 U. S. 496, 509.

The language of the court in the *Wisconsin* case is particularly appropos in the facts of the case at bar. In part the court, at p. 509, says:

"But when the route of the road was definitely fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims."

Deseret Salt Co. v. *Tarpey*, 142 U. S. 241. In this case, at p. 248, the court says:

"In a great number of cases grants containing similar terms have been before this court for consideration. They have always received the same construction, that unless the terms are restricted by other clauses, they import a grant *in praesenti*, carrying at once the interest of the grantor in the lands described."

In *Jatunn* v. *Smith*, 95 Cal. 154, 157, the California Supreme Court said:

"On the contrary, the grant of land to the company by the acts of Congress of July 1, 1862, and July 2, 1864, to aid in the construction of its road, was a grant *in praesenti* of every alternate section of land not reserved by such granting acts, passing the legal title thereto as of the date of the grant, as soon as those sections were identified by a legal survey, and the definite location of the road for which the grant was made."

The same court, in the same case, at p. 159, said:

"When the legal title to land is granted by act of Congress, the title of the government is as effectively divested as it would be by the issuance of a patent therefor by the executive department, under authority of law, and such land then becomes subject to the limitation laws of the State in which it is situated; and an adverse possession thereof after the date of such grant for the requisite period fixed by such laws will ripen into a legal title in favor of the adverse possessor, and the effect of such possession is not interrupted or defeated by the subsequent issuance of a patent therefor, in pursuance of such act of Congress."

Mr. Lindley says (Lindley, Mines (2d ed.) Sec. 154):

> "Grants of particular sections or of lands 'in place' do not acquire precision until the lands are surveyed and the line of the road is definitely fixed. Until such time the grant is said to be a float, and congress retains the power to otherwise dispose of them. Such grants are, however, grants *in praesenti*. They attach to particular tracts as soon after the filing of the map of definite location of the road as these tracts become identified by survey; and when so identified, title vests in the company, in the absence of legal impediments, by relation as of the date of the passage of the act. This is too well settled to require argument. The authorities in support of it are numerous and uniform."

In the case at bar, the California Supreme Court, in the face of the foregoing unquestionable authorities, said (17 A. C. 234):

> "In the present case there was no final and definite location of the Ames Tract by the railroad until the securing of the patent in 1880. Under the act of July 25, 1866, it had merely a 'floating grant' whereby it might secure title to land on which it subsequently located. When the Ames Tract was finally and definitely located in 1880 its subsurface not only was known to be mineral but was subject to the vested extralateral rights of the adjoining mines."

By this ruling the California Supreme Court thus gave priority to the title to both mining claims. In the light of the foregoing authorities this ruling was error and served to defeat petitioners' rights.

3. The grant to the railway company was a grant of all the estate and title of the United States in the Ames land which was a common law fee.

Deseret Salt Co. v. *Tarpey*, 142 U. S. 241, 248:

> "No partial or limited interest is designated, but the lands themselves are granted, as they are described

> by the sections mentioned. Whatever interest the United States possessed in the lands was covered by those terms, unless they were qualified by subsequent provisions, a position to be presently considered."

By virtue of the foregoing authority, the railway company acquired a fee simple title in the Ames land as of July 25, 1866.

Nevertheless, in the case at bar, the California Supreme Court said (17 A. C. 234):

> "The subsurface of the Ames Tract being clearly mineral could not pass under the terms of the act but remained in the government, and the Pennsylvania and Jefferson mines received full extralateral rights therein by virtue of the Mining Act of July 26, 1866".

The California court cited cases to support this ruling which are not in accord therewith. None of them held that a patent, when issued, conveyed only the surface of the land described. An exception inserted in a patent by the Land Office that is not authorized by Congress is void:

Burke v. *Southern Pac. R. R. Co.*, 234 U. S. 669, 710.

Neither can a court limit a patent in a way not authorized by Congress. In none of the various land grants, made by Congress in aid of railroad construction, were they limited to surface rights and prior to the case at bar, no court has ever so held.

As further evidence of the fallacy of the holding of the California Supreme Court is the mineral land exception clause of the granting act. Mineral lands were excepted but in lieu of excepted lands other lands were granted. If the subsurface of the Ames land, or any part thereof, came within the exception then the railroad company became entitled to an equal amount of subsurface lands at some other place. The mere statement of this shows the absurd result to which it would lead. The court, in *Burke* v. *South-*

ern Pac. R. R. Co., 234 U. S. 669, 676, completely answered this contention of the California Supreme Court when it said:

> "This granting act, like several others of that period, expressly excluded from its operation 'all mineral lands' other than iron and coal lands. No attempt was made at defining 'mineral lands', and doubtless the ordinary or popular signification of that term was intended."

The foregoing points and authorities completely establish petitioners' contention as to their title.

4. The patent to the Ames land when issued to the railway company conclusively determined that the Ames land was non-mineral and not within the exception of the granting act.

West v. *Standard Oil Co.*, 278 U. S. 200, 211:

> "Ordinarily, where an act granting public lands excludes those known to be mineral, the determination of the fact whether a particular tract is of that character rests with the Secretary of the Interior. See *Cameron* v. *United States*, 252 U. S. 450, 464; *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 684-87. But compare *Dunbar Lime Co.* v. *Utah-Idaho Sugar Co.*, 17 F. (2d) 351. If such act provides for the issue of a patent, whether it be to pass the title or to furnish evidence that it has passed, the patent imports that final determination of the non-mineral character of the land has been made. The issue of the patent terminates the jurisdiction of the Department over the land. See *Barden* v. *Northern Pacific R. R.*, 154 U. S. 288, 327-331; *Courtright* v. *Wisconsin Central R. R. Co.*, 19 L. D. 410; *Heirs of C. H. Creciat*, 40 L. D. 623. And in the courts the patent is accepted, upon a collateral attack, as affording conclusive evidence of the non-mineral character."

Burke v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 710:

"2. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?

"Answer.—A patent issued in such circumstances is irregularly issued, undoubtedly so, but as it is the act of a legally constituted tribunal and is done within its jurisdiction, it is not void and therefore passes the title (*Noble* v. *Union River Logging R. R.*, 147 U. S. 165, 174-175), subject to the right of the Government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued. *McLaughlin* v. *United States*, 107 U. S. 526; *Western Pacific Railroad Co.* v. *United States*, 108 U. S. 510."

Smelting Co. v. *Kemp*, 104 U. S. 636, 640-41:

"The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their

judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

Galve v. *Best*, 78 Cal. 235, 237;
Vore v. *Ephraim*, 173 Cal. 245, 248;
Lindley, Mines (3d ed.), Sec. 161;
Barden v. *Northern Pac. R. R. Co.*, 154 U. S. 288, 330-31.

The California Supreme Court, for its decision in the case at bar, relied upon *Barden* v. *Northern Pacific R. R. Co.*, 154 U. S. 288, and *Northern Pacific R. R. Co.* v. *Sanders*, 166 U. S. 620, saying (17 A. C. 235):

"The patent which definitely located and established the railroad's claim stated that the Ames Tract was agricultural land. Plaintiffs reason that this statement is conclusive as to the nature of the land since the time for coming in and attacking the patent has long since expired, and conclude that since the title to the land secured by the patent relates back to the date of the railroad Grant Act, the full legal title to the Ames Tract had vested in the railroad before the conferring of extralateral rights upon the mines. The act alone, however, cannot be the source of title to any mineral lands. As Justice Field stated in *Barden* v. *Northern*

> *Pacific R. R. Co. supra,* the Railroad Grant Act of July 25, 1866, when it excepted mineral lands meant that title to all mineral lands was to remain in the United States, and no rights to such lands could in any way pass to the railroad. The patent issued to the railroad by virtue of the act could legally affect only non-mineral land, and the theory which relates the title back to the date of the act cannot extend to 'all mineral lands' excepted from the act in express terms. It follows that title to such mineral lands could be acquired as against the railroad subsequent to the enactment of the Railroad Grant Act, and at any time up to the date of the patent. (*Barden* v. *Northern Pacific R. R. Co., supra; Northern Pacific R. R. Co.* v. *Sanders, supra.*)

In neither of these cases had a patent been issued, hence the finality of a patent here involved was not involved in these cases, although in the *Barden* case the court, in discussing the finality of a patent, indicated by inference that if a patent had been involved the result of the case would have been the opposite. The holding of the *Barden* case was that mineral lands in the place limits of railroad grants could be located prior to patent. The California Supreme Court, when pressed as to the finality of a patent, as determined by *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, dismissed this case with the statement (17 A. C. 235):

> "Hence, the contentions advanced by plaintiffs can be resolved into the theory that the patent to the railroad is conclusive as to the agricultural character of the land. In support thereof they cite *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669 (34 Sup. Ct. 907, 58 L. Ed. 1527); *West* v. *Standard Oil Co.*, 278 U. S. 200 (49 Sup. Ct. 138, 73 L. Ed. 265); *Davis* v. *Wieboold, supra.* These cases, however, concern the rights of a mining claim coming into existence after the securing of the agricultural patent. They stand for the proposition that the patent is conclusive as to the character of the land as against mining claims subsequently located."

As pointed out, in neither the *Barden* case nor the *Sanders* case was a patent involved. In the three cases, which the California Supreme Court above states, were relied upon by petitioners herein, the patent was held to be a conclusive determination of the character of the land and such finality does not depend upon whether or not the mining claim was located before or after the patent was issued.

The California Supreme Court, therefore, fails to dispose of the *Burke* case by dismissing it with the comment above set forth. The *Burke* case is the rule of law declared by the United States Supreme Court and appellants are entitled to have the rule of this case properly applied in the case at bar. A patent issued by the United States Land Office is, therefore, conclusive as to the character of the land covered by the patent whether the mining claim originates before or after the patent is issued and no one can attack such patent collaterally.

In *Amador-Medean Gold Mining Co.* v. *South Spring Hill Gold M. Co.*, 36 Fed. 668, one Hammack made application to the Sacramento Land Office to purchase from the United States certain agricultural lands. The application was approved, the purchase money paid and the certificate of purchase issued June 15, 1874. On July 18, 1876, one McKim located a mining claim on land adjacent to the agricultural lands. The patent to the agricultural lands was issued September 13, 1876. Hence, the mining claims in this case came into existence before the patent was issued. Agricultural lands were subject to exactly the same sort of reservation of mineral rights as are railroad lands. The *Amador-Medean* case held that the mining claims had no extralateral rights. This case has been accepted as the law for many years. The ruling of the California Supreme Court is contrary thereto. In the case at bar, the railroad was constructed with the appurtenances specified and the map showing the location of the road as constructed was filed in the

Land Office July 27, 1870 (R. 191) which, according to the language of the court in *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 680:

> "And when by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the government. In other words, it earned the right to the lands described."

In other words, in the case at bar, as in the *Amador-Medean* case, the railroad company paid the consideration whereby it earned the lands thereafter patented to it. Therefore, the railroad company had earned the lands prior to the time of any location shown of the mining claims in question and thereafter procured the patent to the land whereby the result should be the same in the case at bar as in the *Amador-Medean* case. With reference to the *Amador-Medean* case, the California Supreme Court says (17 A. C. 234):

> "These cases, however, hold that at the time of final and definite location of agricultural or townsite land full title therein passes to the grantee as against any mineral rights not then known to exist but coming into being at a later time."

The statements of the California Supreme Court, above quoted, are directly contrary to the facts of the above cases. Its refusal to recognize the true facts of the cases was error and thus served to defeat petitioners' rights.

The California Supreme Court reasoned that respondent's claims had been located under miners' rules and regulations and extralateral rights thus acquired, that the rights thus acquired became vested rights *ipso facto* with the passage of the first mining statute July 26, 1866 (14 Stat. A. L. 251), that the extralateral rights forever thereafter remained appurtenant to mining claims whether patented or

unpatented, or even if abandoned and relocated again and again, and that since the title to the Ames land didn't pass until the patent was issued, the mining claims hence had senior title.

The entire reasoning of the court is false. We have shown that title to the Ames land passed at the date of the grant, July 25, 1866.

Miners on the public domain, prior to the first Act of Congress (July 26, 1866) authorizing the disposal of mineral lands, were trespassers.

Lee Doon v. *Tesh*, 68 Cal. 43;
Lindley, Mines (3d ed.), Sec. 41:

> "Of course, these pioneer miners were all trespassers. They had no warrant or license from the paramount proprietor."

Biddle Boggs v. *Merced M. Co.*, 14 Cal. 279, 374;
Castillero v. *United States*, 67 U. S. (2 Black) 17.

The first mining statute (14 Stat. A. L. 251) was not a granting act, no rights vested by virtue of its terms. It merely provided a policy and method whereby the title of the United States in mineral land could be acquired. Until the steps required by the statute to be taken were taken no right or title passed out of the United States. This seems so clear that argument to show it would be unnecessary but for the position taken by the California Supreme Court. Under this act no vested rights were acquired against the title of the United States by location, alone, of a mining claim. By section 2 of this act, it was only the patent that granted the title of the United States to the mining claim.

Silver Bow M. & M. Co. v. *Clarke* (1885) (5 Mont. 378), 5 Pac. 570, 573;
Black v. *Elkhorn M. Co.*, 52 Fed. 859, 860.

It was not until the passage of the act of May 10, 1872 (17 Stat. A. L. 91), that a miner, by virtue of his location, acquired vested rights. Therefore, since no patent was obtained for respondent's Pennsylvania claim under the Act of 1866, no vested rights were acquired under said act to said claim.

Section 2 of the Mining Statute of 1866 (14 Stat. A. L. 251) provided, in part:

> "* * * it shall and may be lawful for said claimant * * * to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations to any depth, etc."

By the terms of this statute, no rights were acquired against the title of the United States except by patent. A grant by the State or government is to be construed strictly against the grantee and in favor of the grantor.

Comparison of this section with the corresponding section of the mining statute of 1872 (17 Stat. A. L. 91) shows that in the latter act Congress adopted an entirely different theory with reference to the effect of a location. Section 3 of the latter act provides:

> "That the locators of all mining locations heretofore made or which shall hereafter be made * * * so long as they comply with the laws of the United States and the state, territorial and local regulations not in conflict with said laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, etc."

The Act of 1872 gave to the miner something he did not have under the Act of 1866. In other words, under the Act of 1872 the United States granted to the miner by virtue of his location the right to possession and enjoyment of his

mining claim. Under the Act of 1866 he got this right only by virtue of a patent.

The California Supreme Court says (17 A. C. 232):

> "A patent to the Pennsylvania claim was secured by the defendant's predecessors in interest on August 18, 1880, pursuant to the Mining Act of July 26, 1866."

In other words, this Court has said that in 1880 a patent was issued pursuant to the provisions of an act that was expressly repealed by Section 9 of the Act of May 10, 1872 (17 Stat. A. L. 91). The sections of the Act of 1866, under which a patent to a mining claim might have been obtained, together with the extralateral rights, were sections 2 and 3 of said Act. These sections were expressly repealed *in toto* by Section 9 of the Act of May 10, 1872.

The California Supreme Court says (17 A. C. 233):

> "It is clear that Congress intended by the Mining Act of July 26, 1866, to recognize and give legal validity to all existing mining claims in accordance with local rules, customs, and regulations, including extralateral rights in those lands to which such rules and regulations applied. (*Lindley, Mines* (3d ed.), Secs. 40-46; *Jennison* v. *Kirk,* 98 U. S. 453; *St. Louis Smelting & Ref. Co.* v. *Kemp,* 104 U. S. 636; *Morton* v. *Solambo C. M. Co.,* 26 Cal. 527."

None of these authorities stand for the proposition that the Act of 1866 (14 Stat. A. L. 251) constituted a grant of title of the United States to miners on the public domain who prior thereto had located mining claims on the public domain. Nor do any of these authorities hold that by location alone under the Act the locator acquired title, legal or equitable, from the United States. The cases do stand for the proposition that where two claimants base their rights upon the same Act of Congress (the Act of July 26, 1866), the order of their rights shall be governed by the order of

their possessions, respectively. This *recognition* is limited to those claiming under the Act of July 26, 1866, and does not control rights granted by other Acts of Congress, especially those previously passed. In other words, the United States could say that the rights of miners A and B, when acquired under the Act of 1866 or the Act of 1872, should be determined by the order of their possession, respectively, even if possession preceded the Act of 1866.

5. Title to the school land in Section 16 vested as a common-law fee in the State of California upon the filing of the Township and section survey in the land office.

The township and section survey, wherein said section 16 is located, was filed in the Land Office August 6, 1867 (R. 115). On this date the title of the United States vested in the State of California.

Cooper v. *Roberts*, 18 How. 173, 179;
Frasher v. *O'Connor*, 115 U. S. 102, 115.

Therefore, unless the title of the United States in the mining claims with extralateral rights had passed out of the United States prior to the vesting of title to the school land, the latter title carried all the subsurface rights of a common law fee. Since miners on the public domain, prior to July 26, 1866, were trespassers, they could acquire no vested rights, and since they could acquire no vested rights under the act except by patent, it makes no difference whether the claims in question were located before or after the passage of the act, the title of the United States was clear, was a common law fee, and such title vested in the State of California.

The California Supreme Court disposes of this point by saying (17 A. C. 232):

> "Between the Ames Tract and the Pennsylvania and Jefferson mines there is a narrow strip of school land

granted to the State of California under the Act of Congress of March 3, 1853 (10 U. S. Stat. A. L. 244), and this grant also excepted mineral lands from its terms. Subsequent to its final survey in 1867, part of this land was conveyed to the defendants, the residue remaining in the hands of the state as school land. Plaintiffs contend that the state acquired a fee simple in this land, including the subsurface, so that defendants could have no extralateral rights therein and were thus effectively cut off from the Ames Tract."

The California Supreme Court then disposes of petitioners' contention by holding that vested rights were acquired by locations under miners' rules and regulations. We have shown that such miners were trespassers on the public domain and hence could acquire no title, without a grant from Congress.

6. The title of respondent's Pennsylvania claim had its inception under the Act of May 10, 1872 (17 Stat. A. L. 91). This act limited the length of claims to 1,500 feet.

The Pennsylvania claim, as patented, is 1540 feet long (R. 255). The application for patent was filed May 31, 1880 (R. 218). The patent was issued August 18, 1880 (R. 257). We have shown that no title could be obtained by miners by location under their rules and regulations except as among themselves, that no title could be obtained under the Act of 1866 without a patent, hence the Pennsylvania title can come only from the Act of 1872. In discussing respondent's evidence of location hereinafter, we will show that no locations were proved prior to 1872.

If the Pennsylvania title springs only from the Act of 1872 it can have only such rights as the act gives. Section 2 of the Act of 1872 requires that the end lines of a claim located thereunder shall be parallel. Lack of parallel end lines defeats the extralateral right.

Lindley, Mines (3d ed.), Sec. 582.

The same section of the same act limits the length of claims to 1500 feet. Therefore, the same result as to extralateral rights follows the patenting of a claim in excess of the length prescribed.

The California Supreme Court disposes of this point by saying (17 A. C. 237):

> "Plaintiffs argue further that the Mining Act of 1872, by restricting future mining claims asserting extralateral rights to a maximum of 1500 feet along the vein, precludes the patent to the Pennsylvania mine, secured at a later date, from encompassing extralateral rights based upon a greater length. The mining patent cannot thus be limited by that act, however, when issued in pursuance to the earlier act of July 26, 1866, on the basis of an earlier location. (Citing authorities.) The plaintiffs themselves declare that a patent properly issued and in conformance with the provisions of an Act of Congress relates the title back to the data of that act. Furthermore, the additional length of the claim resulted from the consolidation of three original claims, the lines of which need not be shown to establish the validity of an existing patent to the consolidated claim on collateral attack."

The vice of this statement of the California Supreme Court is twofold, first a misapplication of the law as to obtaining title under miners' rules and regulations and the Act of 1866, and second, in its statement that "the additional length of the claim resulted from the consolidation of three original claims, the lines of which need not be shown to establish the validity of an existing patent to the consolidated claim on collateral attack." Respondent failed to prove any miners' rules and regulations authorizing the location of mining claims of any length whatsoever and, further, failed to prove any locations.

7. The burden of proving the right to mine under petitioners' land rested upon respondent. Respondent sought

to show a senior title. The evidence respondent produced in this regard was largely inadmissible being hearsay and self-serving declarations, and failed entirely to prove the issue.

Evidence to establish a location of a mining claim should meet the requirements of the general rules of evidence, as to admissibility and as to sufficiency. Otherwise property of the Federal government is being disposed of without due proof of compliance with Federal statutes.

Without regard to what respondent's proofs were, we have shown that as a matter of law, respondent's predecessors could not acquire title senior to the title of petitioners. Prior to July 26, 1866, Congress had not authorized the disposal of mineral lands. On July 25, 1866, Congress granted petitioners' land to the railroad company. But, aside from the question of law, we propose to show that respondent's evidence did not meet the issue. The requirements of law to establish title or possession under miners' rules and regulations are laid down in *Pralus* v. *Jefferson G. & S. M. Co.*, 34 Cal. 558, 562:

> "Our conclusions, therefore, are: First—That in order to maintain an action of this character in respect to a mining claim on the public domain, the plaintiff must establish at least a constructive possession at the time of the commencement of the action. Second—That such constructive possession can only be established by the proof of three facts: 1. That there were local mining customs, rules and regulations in force in that particular district; 2. What particular acts were required by such mining laws or customs to be performed in the location and working of claims, and the extent of each claim as authorized by such laws; 3. That the plaintiffs have substantially complied with these requirements."

The first requirement of proof is "that there were local mining customs, rules and regulations in force in that particular district."

Also, Mr. Lindley says (*Lindley, Mines* (3d ed.), Sec. 272:

> "Judicial notice cannot be taken of the rules, usages and customs of a mining district and they should be proved at the trial like any other fact by the best evidence that can be obtained respecting them."

The particular acts to be done as required by the local laws and customs must be shown, and performance of such acts required must be shown.

Lindley, Mines (3d ed.), Sec. 176:

> "The character of the land being thus established, its proper location, marking of boundaries and compliance with the local laws, if any such exist, is necessary to perfect a valid mining claim."

Williams v. *Santa Clara Mining Assn.*, 66 Cal. 193, 198:

> "A 'mining claim', as the term is used in the statutes of the United States, is that portion of a vein or lode and of the adjoining surface or of the surface and subjacent material to which a claimant has acquired, the right of possession by virtue of compliance with the laws of the United States and the local rules and customs of miners."
>
> *Daggett* v. *Yreka Mining Co.*, 149 Cal. 357, 365.

8. Respondent's Evidence of Location.

To establish the burden cast upon respondent, respondent offered in evidence, as its Exhibit A, certified copies of all of the papers in the proceeding for patent of the Pennsylvania Mining Claim, based on the application for patent, filed May 31, 1880 (R. 218-256). These documents of this exhibit were:

(1) The application for patent (R. 218-223);
(2) The surveyor's report (R. 223-226);
(3) Articles of Incorporation (R. 226-227);

(4) An affidavit of James Cary, giving excerpts of minutes of meetings of miners of Browns Valley (R. 227-230);

(5) An abstract of title (R. 234-242);

(6) An affidavit of one William Smith (R. 242-243);

(7) A complaint, answer and judgment in an adverse suit (R. 244-249);

(8) Receiver's Receipt (R. 249-250);

(9) Certificate as to publication (R. 250-251);

(10) Application to purchase (R. 251-252);

(11) Register's Final Certificate of Entry (R. 252-253);

(12) Receiver's Receipt (R. 253-254);

(13) Mineral Patent (R. 254-257).

Defendant's Exhibit A was admitted in evidence over objection of plaintiff's counsel (R. 35).

The application for patent is hearsay and is a self-serving statement and, for this reason, is inadmissible in evidence. The subscriber to the application states that his knowledge of the location of the Pennsylvania claim is hearsay (R. 220). A certified copy of this application furnished by the United States Land Office did not render the copy admissible, or any less hearsay or selfserving than the original document.

22 C. J. 220:

> "It is a well established general rule that a statement of a party, whether oral or written, which is of a self-serving nature, is not admissible in evidence in his favor while such statements are usually made because the declarant is for some reason, interested, at the time, in having the fact supposed, or believed to be as stated by him, the element of present interest is not essential, for it has been considered that the rule applies with full force notwithstanding the fact that the declarant was disinterested at the time when the statement was made."

The copy of the surveyor's field notes, being an official document prepared by an officer of the Land Department, is admissible in evidence to prove such acts of the surveyor as he performed in his official capacity. However, these field notes contain no evidence as to the existence of rules and regulations in the Browns Valley Mining District, what the rules were, or compliance therewith by respondent's predecessor.

The copy of the Articles of Incorporation of the Pennsylvania Mining Company, certified to by the United States Land Office, was not admissible in evidence under the California Code of Civil Procedure. The law of the State of California requires original articles of incorporation to be filed with the Secretary of State and a certified copy thereof with the County Clerk of the county in which the corporation has its principal place of business.

The California Code of Civil Procedure, Sec. 1894, provides what writings are public writings.

C. C. P., Sec. 1919, provides:

> "A public record of a private writing may be proved by the original record or by a copy thereof certified by the legal keeper of the record."

Under the foregoing code sections, a certified copy of the copy of the articles of incorporation filed in the United States Land Office is not admissible in evidence. The Secretary of State is the legal keeper of the original articles and the only person who can furnish a certified copy that is admissible in evidence.

The copy of the affidavit of James Cary is hearsay. The use of affidavits as evidence in the State of California is governed by Section 2009, California Code of Civil Procedure, which provides the extent to which affidavits may be used in evidence.

Lacrabere v. *Wise,* 141 Cal. 554, 556.

The evidence in one trial cannot be used in another trial unless the parties in the other trial are the same or in privity.

22 C. J. 428:

> "In order to warrant the reception of evidence given at a former trial it must appear that the parties to the latter trial are, either actually or constructively, the same, as otherwise the party against whom the evidence is offered could not have had the opportunity of cross-examining the witness."
>
> *Tappen* v. *Beardsley*, 77 U. S. (10 Wall.) 427, 434.

The abstract of title which was filed with the application for patent in the United States Land Office is not admissible in evidence under California law.

Dahler v. *All Persons*, 163 Cal. 160, 164.

The copy of the abstract offered and received in evidence was unauthenticated, other than it was certified as a true and correct copy of the abstract on file in the United States Land Office. The abstract purported to be an abstract of documents of record in the County Recorder's office in Yuba County, the very county in which this action was tried. Certified copies of the documents abstracted could have been obtained from the County Recorder of Yuba County and, under the Code of Civil Procedure, Section 1919, above quoted, could have been used in evidence if otherwise admissible.

Furthermore, beside the fact that the abstract was inadmissible in and of itself, the documents abstracted were inadmissible.

Wigmore (2d ed.), Sec. 1572:

> "There is a limited use of deed recitals by way of exception to the hearsay rule, which has its root in orthodox and ancient tradition, and yet has never received great encouragement, and finds recognition in

only a small number of precedents. This use of deed recitals seems to have been recognized for at least half a dozen distinct purposes. * * *

"(8) In *mining claims,* a recital of discovery of a lode or vein, in a prior document of claim, may by custom be admissible.

"Apart from the foregoing specific rules, a recital in an *ordinary deed or document* of title has no ground for being regarded as anything but inadmissible hearsay."

The record, of course, does not disclose what the documents abstracted contain and petitioners had no opportunity to object to the admissibility of the documents abstracted since they were not offered in evidence.

The Affidavit of William Smith is hearsay and inadmissible for the same reason given for the inadmissibility of the affidavit of James Cary.

The complaint, answer and judgment in the adverse suit was inadmissible for the reason that the statements therein contained are hearsay and selfserving statements. Upon the same reasons above given, the remainder of the documents above listed in defendant's Exhibit A are inadmissible. Nothing contained in defendant's Exhibit A shows the existence of miners' rules and regulations prior to 1863, or subsequent thereto; it does not show what acts were to be done to locate a claim under miners' rules and regulations; it does not show any compliance therewith by any of respondent's predecessors in title.

The documents of defendant's Exhibit A, therefore, are inadmissible, but if admissible, they failed to prove the facts of location under miners' rules and regulations which respondent contends would establish seniority for its title.

Defendant's Exhibit H.

Defendant's Exhibit H (R. 286-329) consists of copies of documents on file in the United States Land Office

relating to a prior application, made in 1874, for a patent on the Pennsylvania Mining Claim. These documents were inadmissible in evidence for the reasons given for the inadmissibility of the documents contained in defendant's Exhibit A.

Furthermore, patent records, as such, do not become admissible in evidence merely because they are patent records. Mr. Lindley says (Lindley, Mines (3d ed.)), Sec. 783, p. 1920:

> "While these records are ordinarily received in court as evidence of the facts stated therein, we are of the opinion that the original location and the date of actual discovery must be proved by evidence other than that furnished by the patent record. This seems to be the rule sanctioned by the courts."

Champion Mining Co. v. *Mining Co.*, 75 Cal. 78, 82:

> "* * * It is therefore, somewhat difficult to see how the question of priority of location between the Phillip and Wyoming ledges could be adjudicated in a proceeding in which the location of the Phillip ledge was not involved at all; or how *ex parte* proof, offered in the Wyoming application for the satisfaction of the United States government, is admissible in the case at bar, where the contest is about something not appearing on the face of that application, or involved in that proceeding. If, therefore, the determination of this appeal necessarily depended upon the correctness of the ruling of the court below, admitting the proceedings in the land-office in evidence, we would be strongly inclined to hold such ruling to have been erroneous. In the view which we take of the case, however, it is not necessary to pass conclusively upon that question."

Driskill v. *Rebbe*, (S. D. 1908) 117 N. W. 135;
Smelting Co. v. *Kemp*, 104 U. S. 636.

At page 639 the court says:

> "As seen by the statement of the case, the plaintiff relies for a reversal of the judgment upon three grounds. First—Error in admitting the record of proceedings of the land office to impeach the validity of the patent to the Starr issued upon them; * * *
>
> "We are of the opinion that these several grounds are well taken, and that in each particular mentioned the court below erred."

If the papers on file in a proceeding for patent are not admissible to impeach the very patent based upon them, certainly such papers are not admissible to impeach a patent not based upon such records. The soundness of the holding of the court in the *Smelting Company* case is too evident to require discussion. A judgment rendered by a court of competent jurisdiction cannot be impeached collaterally by the pleadings and evidence upon which the judgment is based.

Respondent also offered in evidence an unauthenticated typewritten copy of what defendant stated to be an *excerpt from "Mineral Resources by J. Ross Brown."* The circumstances of the admission of this document in evidence are set forth in the testimony of the witness W. W. Waggoner (R. 43-45), wherein Mr. Waggoner testified that he resided in Nevada City for forty-eight years; that he was a civil engineer and had compiled sources of information on the territory in which he operated, that he had in his possession a copy of a public document, dated January 8, 1868, titled "Report of J. Ross Brown on Mineral Resources of States and Territories West of the Rocky Mountains"; that he had prepared excerpts therefrom. Thereupon, the excerpt (R. 273-281) which Mr. Waggoner prepared was offered and received in evidence over the objection of petitioners. If the document which the witness Waggoner stated that he had in his possession had been offered in evidence it could have been received in evidence only under

the provisions of the California Code of Civil Procedure, Sec. 1918, which provides:

> "Manner of proving other official documents may be proved as follows: * * *
>
> "9. Documents in the departments of the United States government by the certificate of the legal custodian thereof."

An excerpt of a document is not admissible in evidence without offering in evidence the entire document. The entire document, if admissible at all, is admissible in evidence only under the circumstances set forth in California Code of Civil Procedure, Sec. 1918, Sub. 9, above quoted. But the entire document is not admissible in evidence, it is hearsay. It does not qualify as an official document.

46 C. J. 922;

Coulter v. *Pool*, 187 Cal. 181, 186.

Respondent also offered in evidence an unauthenticated copy of what defendant stated to be an excerpt from Document No. 210, "Statistics of Mines and Mining in the States and Territories West of the Rocky Mountains" by Rossiter W. Raymond, United States Commissioner of Mining Statistics. The circumstances of the admission of this excerpt in evidence are set forth in the testimony of the witness W. W. Waggoner (R. 43-45), wherein Mr. Waggoner testified that he had in his possession a copy of said document No. 210, whereupon, and over the objection of petitioners, the excerpt was received in evidence. The excerpt consisted of a quotation taken by the author from a newspaper. This excerpt will be found in the Record pp. 282-283. This exhibit is subject to all of the objections that the excerpt from "Mineral Resources" by J. Ross Brown is subject to and the further objection that it is merely the copy of a newspaper report, which newspaper

report itself is hearsay and not admissible in evidence. The fact that it is copied in some document does not make the copy more admissible than the original source itself would be.

Respondent also offered in evidence an unauthenticated typewritten copy of what defendant stated to be an excerpt from a work called "History of Yuba County, 1879" by Chamberlain and Wells, admitted in evidence (R. 48) (Document at R. 284-85). No foundation whatsoever was laid for the admission of this work, or an excerpt therefrom, in evidence. It was not shown to be authentic. It was not offered for the purpose of proving facts of general notoriety and interest (California C. C. P., Sec. 1936). In fact, the purpose of this evidence was to prove something that no one knew anything about. Such works are not admissible to prove particular facts or customs.

Bank of England v. *Anderson*, 4 Scott 83;
Roe v. *Strong*, 107 N. Y. 350;
State v. *Moy Looke*, 7 Ore. 54;
Allen v. *Halstead*, 39 Tex. Civ. Ap. 324, 87 S. W. 754.

Aside from the inadmissibility of the excerpts, above discussed and received in evidence, they fail to prove that there were rules and regulations in the Browns Valley Mining District at the time respondent contends its mining claims were located. They fail to prove any acts done by respondent's predecessors as to location, if any locations were made under the unproven rules and regulations.

Finally, respondent produced two witnesses: One, Mrs. Emma Hibbert (R. 49-59) who testified that she was seventy-eight years old; that she came to Browns Valley when she was four years old, at which time the mills were running and that her father worked in and about the mine. She gave no evidence as to miners' rules and regulations, the acts required thereby for the location of mining claims

or any acts done by respondent's predecessor as to location of any mining claims whatsoever. Respondent's second witness, Mrs. Ann Burris, whose testimony was given by deposition (R. 60-77), testified that she was seventy-six years old at the date of the deposition (1937); that she came to Browns Valley in 1862. She was, therefore, in her second year at the time of her arrival in Brown's Valley. She gave certain testimony as to work being carried on on the Pennsylvania and Jefferson mines in 1866 but gave no testimony whatsoever as to miners' rules and regulations, the acts required thereunder for location, or any acts done by respondent's predecessor thereunder. There is, therefore, no evidence in the record to support the trial court's finding 3 and 4 (R. 12-13), and finding 9 (R. 14). Such requirements of proof cannot be supplied by presumption.

Daggett v. *Yreka Mining etc. Co.*, 149 Cal. 357, 365.

9. Ruling of the California Supreme Court on the Above Evidence.

Notwithstanding the character of the foregoing evidence, the California Supreme Court held that it proved a title in respondent senior to the title of petitioners, and title in respondent senior to the title of the State of California in the school land. The California court says (17 A. C. 232):

> "Defendants have presented evidence in the form of testimony of old settlers, abstracts of title, patent records, deeds, and government reports and surveys to prove the original location of both the Pennsylvania and Jefferson claims in accordance with the miners' rules and regulations prior to 1863; the working of these claims, including the subsurface of the Ames Tract, prior to 1866; the securing of a patent to the Pennsylvania mine in 1880, with a continuous chain of title to this mine culminating in the present defendants as against all existing claims on the Jefferson mine."

The California court stated that the evidence came within exceptions to the hearsay rule, saying (17 A. C. 239):

> "Defendants introduced properly authenticated copies of deeds and other instruments now of record in the county recorder's office in Yuba County, patent records on file in the official records in the General Land Office in Washington, D. C., printed official reports of the 'Mineral Resources' of the public domain of the west, published under authority of congress and other historical material. This evidence was supplemented by the oral testimony of two old settlers that both the Pennsylvania and the Jefferson mines were in operation on the present location in the early 1860's. The case of Kent *v.* Snyder et al. (1866), 30 Cal. 666, which mentions in its statement of facts the location of the Jefferson claim by its original owners corroborates the existence of this claim prior to 1866."

We have discussed above the inadmissibility of the evidence mentioned in the quotations from the opinion of the California court above, except two items. The California court says "defendants have presented evidence in the form of * * * deeds", and, again "defendants introduced properly authenticated copies of deeds and other instruments now of record in the County Recorder's office of Yuba County." There is absolutely no foundation in the record for this statement by the California court. Respondent did not offer in evidence a single deed, nor a single authenticated copy of a deed. Instead, respondent relied upon a copy of the abstract of recorded documents, which abstract was filed in the United States Land Office with the application for patent in 1880. If the documents abstracted, or properly authenticated copies thereof, had been offered in evidence there would have been no purpose in using the abstract. We are at a loss to understand this statement by the California court.

The second item which the California court treats as evidence is a statement of facts in *Kent* v. *Snyder*, 30 Cal. 666. There was not one record from the case of *Kent* v. *Snyder* introduced in the case at bar. The consideration of these facts is directly contrary to the holding of the California court in *People* v. *Newell*, 192 Cal. 659, 668, wherein the court says:

> "It is urged by appellant that because both informations were identical except in the particular already mentioned, a question of law only was presented which the court should decide, thus ignoring the rule laid down in the authorities we have cited that special pleas must be supported by evidence and determined by the jury, even when both trials have been held in the same court. In such circumstances the court does not take judicial notice of what is contained in its files, the records, or the evidence, but proof must be offered by the defendant to sustain the pleas."

The foregoing discussion indicates also that there is no foundation for the statement of the California court (17 A. C. 238) that "the additional length of the claim resulted from the consolidation of three original claims, the lines of which need not be shown to establish the validity of the existing patent to the consolidated claim on collateral attack."

If respondent failed to prove any location or acquisition of rights under the Act of 1866, its location of its Pennsylvania claim is based merely on the presumption that a location was made prior to patent. This presumption does not relate to any particular time and, since the patent was granted in 1880, under the Act of 1872, the effect of the presumption is that the Pennsylvania claim was located under the Act of 1872.

10. Respondent's Jefferson Claim.

(1) The Jefferson is that part of the vein which has its apex in the Jefferson claim. Respondent's right to mine

on this vein under the Ames land is derived solely from the reservation contained in the deed to petitioners (R. 213).

The earliest location to which respondent attaches its title in this claim is the F. W. Johnson location, made June 4, 1891 (R. 260). Petitioners contend that respondent has no extralateral rights in their land with reference to this claim for all the reasons above given as to the Pennsylvania claim;

Under the decision of the California Supreme Court this claim may be abandoned and relocated over and over again, and each locator with each new location acquire a new extralateral right in the Ames land. If this claim should be forever abandoned and be disposed of as agricultural by the United States, to whom would this vein belong? Clearly, this claim has no extralateral rights in the Ames land.

In conclusion, we submit that Mr. Justice Carter, in his dissenting opinion, has clearly analyzed the situation presented by the controversy between the parties hereto and that he has reached the right conclusion with reference thereto.

We submit, therefore, that the judgment of the California Supreme Court affirming the judgment of the Superior Court of Yuba County should be reversed, and this matter remanded to the Yuba County Superior Court for the purpose of ascertaining petitioners' damage suffered by reason of respondent mining petitioners' ore.

Respectfully submitted,

SIMEON E. SHEFFEY,
HERMAN WEINBERGER,
Attorneys for Petitioners.

RICHARD BELCHER,
Of Counsel for Petitioners.

SEP 8 1941
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES and GERTRUDE AMES
(husband and wife),
Petitioners,

vs.

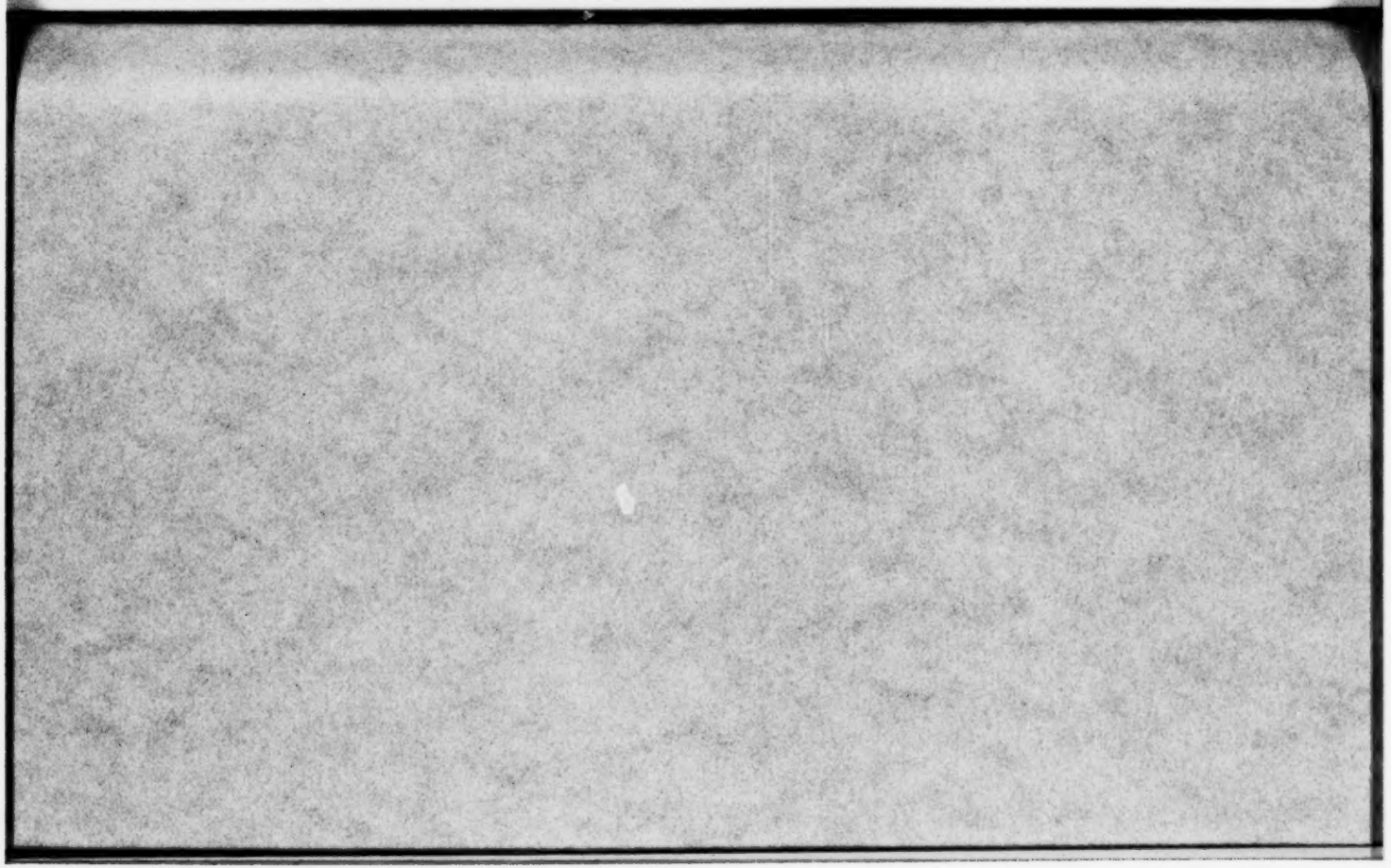
EMPIRE STAR MINES COMPANY, LTD.
(a corporation),
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

ROBERT M. SEARLS,
Standard Oil Building, San Francisco, California,
WM. E. COLBY,
Mills Tower, San Francisco, California,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA



Subject Index

Page

Restatement of Facts 3

Respondent's Title 3

Petitioners' Title 3

The True Issue 5

Congress, long prior to the Mining Act of July 26, 1866, had recognized the rights of miners on the public domain.. 5

The Act of July 26, 1866 confirmed the miners' extralateral right 6

The settled policy of Congress at all times was to exclude "mineral lands" from its grant to States and railroads.. 9

Rights to mineral lands in railroad sections can be lawfully acquired by miners up to the very date of patent..... 10

The cases relied on by petitioners are distinguishable..... 11

This Court has already decided the major issue in favor of respondent 14

The case of Broder v. Natoma Water Co., 101 U. S. 274.... 17

The Certificate of Final Entry of the Pennsylvania Mine antedated the railroad patent by 15 days..... 18

The school land in Section 16 was at all times subject to the Pennsylvania extralateral right..... 19

The Pennsylvania Lode Mining Claim, 1540 feet in length, was patented pursuant to the Mining Act of 1866..... 19

The remaining contentions of petitioners deal with the admissibility of evidence under laws of California. Such rulings may not be made the basis for granting certiorari here 21

The Dissenting Opinion 22

The Equities 22

Table of Authorities Cited

Cases	Pages
Amador-Medean Co. v. South Spring Hill Co., 36 Fed. 668	16
Ames v. Empire Star Mines Co. (Cal. App.), 93 Pac. (2d) 635	18
Anaconda Copper M. Co. v. Pilot Butte M. Co. (Mont.), 156 Pac. 409	16
Atcheson v. Peterson, 20 Wall. (87 U. S. 507)	13
Barden v. N. P. R. R. Co., 154 U. S. 288	10, 12, 13, 18
Barrington v. Missouri, 205 U. S. 483	22
Belk v. Meagher, 104 U. S. 279	6, 8
Broder v. Natoma Water Co., 101 U. S. 274	13, 17
Burke v. S. P. R. R. Co., 234 U. S. 669	12
Carson City M. Co. v. North Star M. Co., 73 Fed. 597	20
Central Pac. Ry. Co. v. Alameda Co., 284 U. S. 463	13, 18
Chambers v. Harrington, 111 U. S. 350	8, 13
Chapman and Dewey Land Co. v. Bigelow, 206 U. S. 41	22
Chrisman v. Miller, 197 U. S. 313	22
Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220	21
Cramer v. United States, 261 U. S. 219	18
Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55	6, 8
Deseret Salt Co. v. Tarpey, 142 U. S. 241	11
Dower v. Richards, 151 U. S. 658	21
East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266	14, 16
El Paso v. McKnight, 233 U. S. 250	4, 18
Flagstaff M. Co. v. Tarbet, 98 U. S. 463	7, 8
Forbes v. Gracey, 94 U. S. 762	8
Ickes v. Development Corp., 295 U. S. 639	8
Iron Silver M. Co. v. Cheesman, 116 U. S. 529	8
Jennison v. Kirk, 98 U. S. 453	13
Jim Butler v. West End M. Co., 247 U. S. 450	9
Lawson v. U. S. Mining Co., 207 U. S. 1	20
Los Angeles Farming and Milling Co. v. Los Angeles, 217 U. S. 217	22

Pages

N. P. R. R. v. Sanders, 166 U. S. 620.....10, 11, 13, 18

Pacific Coast Co. v. Spargo, 16 Fed. 348..... 16
Paterson v. Ogden, 141 Cal. 43..... 16
Pennsylvania M. Co. v. Grass Valley Co., 117 Fed. 509....16, 20
Pilot Butte M. Co. (Mont.), 156 Pac. 409..... 16

Reeves v. Oregon Exploration Co. (Ore.), 273 Pac. 389.... 16

Sparrow v. Strong, 3 Wall. (70 U. S.), 97..... 6, 13
Stewart M. Co. v. Ontario M. Co., 237 U. S. 350..... 9
St. Louis M. Co. v. Montana M. Co., 194 U. S. 235..... 9

United States v. Sweet, 245 U. S. 563..... 9, 19

Walrath v. Champion M. Co., 171 U. S. 293..... 6, 8
West v. Louisiana, 194 U. S. 258..... 22
West v. Standard Oil Co., 278 U. S. 200.....12, 19
Wilbur v. Krushnic, 280 U. S. 306..... 8
Wisconsin v. Price, 133 U. S. 496..... 11
Wright v. Vinton Branch, 300 U. S. 440..... 7
Wyoming Co. v. Champion Co., 63 Fed. 540..... 20
Wyoming v. United States, 255 U. S. 489..... 10

Text Books

Costigan on Mining Law, p. 450..... 17

Hughes, Federal Practice, Vol. 5, §§3257-3260..... 22

Kenny, The Law of the Apex, pp. 210-214..... 17

Lindley on Mines (3rd. Ed.)—
§47, p. 84 6
§§152-154 9
§154, p. 289 18
§538, pp. 1199-1200 6
pp. 1252-5, 1256 8
§574, p. 1272 15
p. 1483 16
§612 17

Martin on Mining Law, p. 236..... 17
Morrison's Mining Rights (16th Ed.)..... 17

Ricketts, American Mining Law, §§172, 945..... 17

Pages

Snyder on Mines, §760, p. 658; §865, p. 766..... 17

U. S. Revised Statutes:
Act of February 27, 1865, 13 Stat. 440 (now §910 U. S. Rev. Stats.) 6, 10
Act of May 5, 1866, 14 Stat. 43..... 6
Act of July 25, 1866, 14 Stat. 239.....5, 9, 10
Act of July 26, 1866, 14 Stat. 251.....5, 6, 8, 12, 13, 17
Act of May 10, 1872, 17 Stat. 91.....19, 20

Miscellaneous

Congressional Globe, June 18, 1866..... 6

Sliger Gold Mining Co., 56 L. D. 67..... 19

United States v. State of California, 55 L. D. 121..... 19

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES and GERTRUDE AMES (husband and wife),
Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD. (a corporation),
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Petition for a Writ of Certiorari should be denied for the following reasons:

(1) The decision of the Supreme Court of the State of California is in complete conformity with principles of law announced by this Court in a long line of decisions

and does not involve any new and undecided judicial principles.

(2) The decision below will not jeopardize titles to railroad or state lands. To accept petitioners' erroneous contentions would, however, upset innumerable titles and rights to mining lands throughout the West which have become established through the past three-quarters of a century on the faith of the decisions of this Court in similar cases.

(3) The case below received full consideration by the trial court, the District Court of Appeals, and the Supreme Court of the State of California. In each court an application for a rehearing was also made and fully argued. Of the eleven participating judges there was but one judge dissenting.

(4) California is a mining state where the mining law here under consideration originated in the customs of the early miners. The courts of California have had occasion to interpret these principles of mining law more often than the courts of any other state. Their decisions are, therefore, entitled to great weight in the consideration of these principles.

(5) The petition, the supporting brief, and the dissenting opinion contain many erroneous statements of both law and fact which are vital to a correct determination of the issues involved. The petition has not fairly presented the questions at issue to this Court.

(6) The petition and brief raise every question decided in the trial court and in the appellate courts below, even those involving the admissibility of evidence governed by California law exclusively. The trial court made Findings of Fact on every point in issue, and these were con-

curred in by the California Supreme Court. (R. 11-19, 379-381.)

RESTATEMENT OF FACTS.

The failure of the petition and brief to call this Court's attention to vital facts necessitates a brief fact restatement, in conformity with the trial Court's findings.

Respondent's Title.

As early as 1863 both the Pennsylvania and Jefferson locations were in possession of and being worked by the then owners, the Pennsylvania and Jefferson Mining Companies respectively, and great values in gold were thereafter produced from each mine. (R. 50, 52, 53, 54, 57, 61-6, 75, 77, 234-242, 274-7, 282, 284, 303-9, Findings of Fact 3 and 9, R. 12 and 9.) The Pennsylvania and Jefferson claims are coterminous, the top edge or apex of the included vein extending through the center of each claim from end line to end line. On its descent into the earth this vein dips easterly and passes beyond the side lines of the two claims and beneath a 200 foot wide strip of state school land and then, at a vertical depth of about 600 feet from the surface, enters beneath the "Ames tract" railroad land and has been progressively mined on its dip beneath that tract to a depth of 1000 feet or more. (The relative position of the workings on the vein and the surface areas appear on map opp. p. 12, petition. See also Findings of Fact 5, 6 and 15 R. 12-15.) As shown by this map, the Jefferson vein is but the onward extension on strike of the Pennsylvania vein. The mine workings, consisting of two separate shafts, sunk on the inclination of the vein from its top or apex at the surface of each of the

Pennsylvania and Jefferson claims respectively and levels extending therefrom had penetrated beneath the subsurface of the Ames tract at and prior to July 25, 1866, the date of the railroad grant act at which date neither section 15 or 16 had been surveyed. (R. 15, 16, Findings 12, 13.) The Pennsylvania location was patented August 18, 1880, to the Pennsylvania Mining Company (R. 254), the Certificate of Final Entry, which is for legal purposes the equivalent of patent (*El Paso Co. v. McKnight,* 233 U. S. 250, 257), having issued May 31, 1880 (R. 252) or 15 days prior to the issuance of petitioners' railroad patent, June 14, 1880. A complete chain of title vests the right to work the Pennsylvania mine in respondent. (Finding 8, R. 14.)

Respondent has also succeeded to the right to mine the Jefferson unpatented mining location. The petition (pp. 7, 8, 45) is in error in stating that title to this mining location and the right to follow the vein therefrom extralaterally under the Ames tract is a question here in issue. The trial court (R. 18) and the California Supreme Court (R. 379), including even the dissenting justice (R. 413), each decided that, because of the express reservation of the Jefferson vein from the only conveyance under which petitioners claim title to the Ames tract of railroad land and the fact that respondent had succeeded to this reserved right to mine the Jefferson vein, it was unnecessary to pass upon the validity of the Jefferson location and its right to follow the vein on dip. (Findings of Fact 14-19, R. 16-18.)

Petitioners' Title.

The "Ames Tract" in Section 15, beneath which at great depth (600 to over 1000 ft.) the Pennsylvania vein

extends on its dip, was patented June 14, 1880 to the railroad company, pursuant to Act of Congress of July 25, 1866. (14 Stat. 239.) This act and the patent (R. 209, 211) expressly excepted "all mineral lands". The railroad filed its map of definite location of its road July 27, 1870. (R. 12, Finding 2.)

THE TRUE ISSUE.

As we shall point out, the mineral exception contained in the Railroad Act of 1866 is operative up to the very date of the railroad patent. Any mineral title, either to the surface of the railroad land or to any vein dipping beneath the railroad land and apexing in "land adjoining", could be acquired, good as against the railroad patent, up to its very date, which was June 14, 1880. Therefore, the real issue is not, as petitioners erroneously state, one of seniority of title (petition 2, 5, 7) but rather whether prior to June 14, 1880, title to the extralateral segment of the Pennsylvania vein had been acquired by respondent's predecessor so as to have been legally severed from the subsurface of the Ames tract and thus excepted from the patent to the railroad company. Because of the express mineral exception in this railroad act, it is wholly immaterial that the railroad act antedated the Mining Act of July 26, 1866, by one day.

CONGRESS, LONG PRIOR TO THE MINING ACT OF JULY 26, 1866, HAD RECOGNIZED THE RIGHTS OF MINERS ON THE PUBLIC DOMAIN.

Counsel erroneously refer to the Mining Act of July 26, 1866, as "the first mining act of Congress". (Petition 2,

11, 25, 26.) On February 27, 1865 (13 Stat. 440) Congress enacted that, "No possessory action between individuals *in any of the courts of the United States for the recovery of any mining title*"* should be affected by the fact that the paramount title was in the United States. This provision in the act has been held to apply to the Public Domain in all the mining states and is now codified as §*910 U. S. Rev. Stats.*

Sparrow v. Strong, 3 Wall. (70 U. S.) 97, note on p. 100;

Belk v. Meagher, 104 U. S. 279, 283-4;

Lindley on Mines (3rd Ed.) §47, p. 84; §538, pp. 1199-1200.

Again on May 5, 1866, Congress legislated (14 Stat. 43) concerning "valid subsisting mining claims" in Nevada and "possessory titles (to mineral lands) *in the mining States and Territories*".

Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 62;

Walrath v. Champion M. Co., 171 U. S. 293, 302-5.

THE RIGHT CREATED BY THE MINERS IN THE EARLY 1850's TO FOLLOW THE VEIN EXTRALATERALLY BENEATH THE SURFACE OF "ADJOINING LAND" WAS FURTHER APPROVED AND CONFIRMED BY THE MINING ACT OF JULY 26, 1866. (14 STAT. 251.)

This act was the first mining act to provide for issuance of a patent to a mining claim. (§§2 and 3 of 14 Stat. 251.) Section 4 thereof grants to "locations" (not patented claims as counsel erroneously contend at pp. 4, 11, 30, 45) "the right to follow such vein to any depth

*Italics in this brief are ours.

with all its dips, variations and angles * * *". This right later was called the "extralateral right".

This obvious construction of the plain terms of the act is confirmed by its authors, Senators Stewart and Conness.

> "This bill provides for selling the vein and following it into the earth with its natural dips and angles." (Stewart.)
>
> *Congressional Globe,* June 18, 1866, p. 3452.

> "* * * the miner is authorized to follow every vein according to its dips, angles and variations." (Conness.) (id. p. 3233.)

> "Explanations given on the floor of the Senate * * * by those in charge of the measure"

afford enlightenment for the courts.

> *Wright v. Vinton Branch,* 300 U. S. 440, 463.

See also Senator Stewart's extended remarks concerning the purpose of this act found as an appendix in 70 U. S. 777-780.

This Court *commenting on this Mining Act of 1866* has said:

> "* * * the owner of a mining right in a vein or lode may follow the dip to an indefinite distance outside his side lines. This is undoubtedly the general rule of miners' law, and the true construction of the Acts of Congress."
>
> *Flagstaff M. Co. v. Tarbet,* 98 U. S. 463, 467.

This Court then quotes from §4 of the Act of 1866 which gives the owner of a "location" (not a patented claim) "the right to follow such vein to any depth". (id.)

See, also,

Walrath v. Champion M. Co., 63 Fed. 552 and

Lindley on Mines (3rd Ed.) pp. 1252-5, 1256

where Judge Lindley very definitely says that the Mining Act of 1866 confirmed the "dip rights" of "*unpatented* claims" and

> "was in effect a proclamation severing veins and lodes * * * from the body of the public domain".

Section 2 of the Mining Act of 1866 specifically provided that *the "land adjoining shall be sold subject to this condition"* viz.: "the right to follow such vein or lode * * * to any depth although it may enter the land adjoining * * *".

This right to pursue veins in depth could be enjoyed without the necessity of securing patent, contrary to petitioners' erroneous contention. (Petition, 26-28.) A valid mining location has the effect of a grant from the government "as good as though secured by patent".

Forbes v. Gracey, 94 U. S. 762, 766-7;
Belk v. Meagher, 104 U. S. 279, 283;
Chambers v. Harrington, 111 U. S. 350, 352-3;
Wilbur v. Krushnic, 280 U. S. 306, 316-317;
Ickes v. Development Corp., 295 U. S. 639, 644.

It is also a grant of the vein apexing therein, "throughout its depth" and the vein is thereby severed from "the land adjoining".

Flagstaff M. Co. v. Tarbet, 98 U. S. 463, 467;
Iron Silver M. Co. v. Cheesman, 116 U. S. 529, 531, 533;
Del Monte Co. v. Last Chance Co., 171 U. S. 55, 66-7, 87, 91;

St. Louis M. Co. v. Montana M. Co., 194 U. S. 235, 237;

Stewart M. Co. v. Ontario M. Co., 237 U. S. 350, 353;

Jim Butler v. West End M. Co., 247 U. S. 450, 454-5.

Therefore, the result is inescapable that when the Ames tract was sold to the railroad and patented on June 14, 1880, the Pennsylvania vein, which had been located and worked as early as 1863, owned continuously thereafter and Final Certificate of Entry for which had issued May 31, 1880, had long since been severed from the overlying railroad surface.

THE SETTLED POLICY OF CONGRESS AT ALL TIMES WAS TO EXCLUDE "MINERAL LANDS" FROM ITS GRANTS TO STATES AND TO RAILROADS.

Congress passed many acts of grant to both railroads and states, including the Railroad Act of July 25, 1866, expressly excepting "minerals" and "mineral lands" from such grants.

> These acts "were but expressive of the will of Congress that *every grant of public lands*, whether to a state or otherwise, should be taken as reserving and excluding mineral lands * * *".
>
> *United States v. Sweet*, 245 U. S. 563, 567-570;
>
> *Lindley on Mines* (3rd Ed.) §§152, 154.

RIGHTS TO MINERAL LANDS IN RAILROAD SECTIONS CAN BE LAWFULLY ACQUIRED BY MINERS UP TO THE VERY DATE OF THE PATENT TO SUCH RAILROAD LANDS.

The leading cases by this Court announcing this rule are

Barden v. N. P. R. R., 154 U. S., 288, 312-3, 316-7, 318-9, 321;

N. P. R. R. v. Sanders, 166 U. S. 620, 633-4;

Wyoming v. United States, 255 U. S. 489, 507-8.

See also

Lindley on Mines (3rd Ed.) §154, p. 289.

The *Sanders* case above noted, and many others that could be cited, answer the position taken by petitioners that at the date of the passage of the Railroad Act of July 25, 1866, Congress had not sanctioned the location of mineral lands. Congress by its Act of February 27, 1865, had already recognized the miners' possessory rights, but the *Sanders* case says even this was unnecessary:

> "It is quite true that at the time of the passage of the (Railroad Grant) act of 1864 there was no Act of Congress under which a right or claim could be initiated to mineral lands. But as said by Mr. Justice Field in *Jennison v. Kirk*, 98 U. S. 453, 458, 'for eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the States, constituted the law governing property in mines and in water on the public mineral lands'. And on July 26, 1866, *before the general route of the Northern Pacific Railroad was fixed*, Congress passed an act looking to a sale of the mineral lands of the United States, and declared them to be 'free and open to exploration and occupation by citizens of the United States and those who have declared their intention to become citizens, subject to such regulations as

may be prescribed by law and the local customs or rules of miners in the several mining districts so far as the same were not in conflict with the laws of the United States'. In *Broder v. Water Co.*, 101 U. S. 274, 276, it was said to be the established doctrine of this court that the rights of miners, who had taken possession of mines and worked and developed them, were rights which the Government had by its conduct recognized and encouraged, and was bound to protect, *before the passage of the act of 1866.* The act of 1866 was held to be a statutory recognition of the right to explore for mineral lands. That right was in nowise impaired, in respect of the lands in question, by the subsequent acceptance from the Northern Pacific Railroad Company of its map of general route. And that act was supplemented by the act of May 10, 1872, c. 152, 17 Stat. 91. *The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress,* and no right attached to any specific section until the road was definitely located and the map thereof filed and accepted. *Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper.*" (pp. 634-5.)

N. P. R. R. Co. v. Sanders, 166 U. S. 620, 634-5.

THE CASES RELIED ON BY PETITIONERS EITHER DO NOT INVOLVE MINERAL LANDS OR ARE DISTINGUISHABLE ON OTHER GROUNDS.

Petitioners (pp. 16-17) cite the cases of *Wisconsin v. Price,* 133 U. S. 496, and *Deseret Salt Co. v. Tarpey,* 142 U. S. 241, to the effect that railroad grants operate *in praesenti,* the title conveyed by a railroad patent relating back to the date of the railroad grant. No one denies this

to be the general rule. But neither of those cases involved mineral lands. Justice Field wrote the opinions in both cases. In the later *Barden* case (which involved mineral lands) Justice Field distinguished them, saying:

> "In both those cases the writer of this opinion had the honor to write the opinions of this court; *and it was never asserted or pretended that they decided anything whatever respecting the minerals.*"
>
> *Barden v. N. P. R. R. Co.*, 154 U. S. 288, 315.

Petitioners also (pp. 3, 19, 20, 21, 23, 25) urge that the cases of *Burke v. S. P. R. R. Co.*, 234 U. S. 669 and *West v. Standard Oil Co.*, 278 U. S. 200, support their contention that the railroad patent to the Ames land, once issued, concluded any possibility of any third party from thereafter asserting title to either the surface or subsurface of that land. As far as surface rights are concerned this is correct. But respondent is not claiming any surface rights in the Ames land. All that it is claiming is the right to follow its Pennsylvania vein extralaterally into the subsurface of this adjoining railroad land "which land adjoining shall be (and was) sold subject to this condition". (§2 of 14 Stat. 251.)

The Burke case involved only surface conflicts between railroad patented lands and placer mining locations *initiated 14 years after the date of the railroad patent.* (See 234 U. S. at p. 676.) No extralateral rights were involved in the *Burke* case.

The *West v. Standard Oil case* is similarly inapplicable because no extralateral rights were involved. The case is important, however, in demonstrating the fact that without a hearing and determination of non-mineral character by the Land Department, title to school land did not pass under a State patent.

Counsel also cite (p. 26) cases by inferior courts describing the early miners on the public domain as "trespassers". While technically true in the very early days, the following cases decided by this Court hold that the miners' rights were later definitely recognized by Congress and the courts.

Sparrow v. Strong, 3 Wall. (70 U. S.) 97, 104;
Atcheson v. Peterson, 20 Wall. (87 U. S. 507, 512;
Jennison v. Kirk, 98 U. S. 453, 458;
Broder v. Water Co., 101 U. S. 274, 276-7;
Chambers v. Harrington, 111 U. S. 350, 352-3;
Barden v. N. P. R. R. Co., 154 U. S. 288, 318-320;
N. P. R. R. v. Sanders, 166 U. S. 620, 634;
Central Pacific Ry. Co. v. Alameda Co., 284 U. S. 463, 471.

Counsel except to the State Supreme Court's holding (R. 375) that the railroad grant remained a "float" as to the Ames tract until the issuance of railroad patent in 1880. It is true that the railroad filed its map of definite location of the road in 1870 and that the grant then ceased to be a "float" in one sense. But as far as mineral lands are concerned the status of the railroad lands was still a "float" for, under the rulings of this Court, mineral title to the railroad land may be acquired up to the very date of the railroad patent, and hence no one may say prior to such date that the "inchoate" railroad title will ever attach. The point made by petitioners' counsel is, however, of no consequence because the title of respondent's predecessors to the Pennsylvania mine became vested long prior to 1870 and the vein had, therefore, long prior to that date been severed from the "land adjoining" by specific Congressional enactment. (Act of July 26, 1866.)

Counsel also erroneously assert that the California Supreme Court held that the railroad patent granted

> "title to the surface only of said lands * * * that title to the subsurface of said lands remained in the United States * * *." (Petition, pp. 4, 10, 11, 14, 19.)

While there is language in the majority opinion which, if isolated, might be so construed, nevertheless, an opinion, like any other document, must be read as a whole. That the California Supreme Court had no intention of holding as counsel suggest is proven by the following language of the opinion:

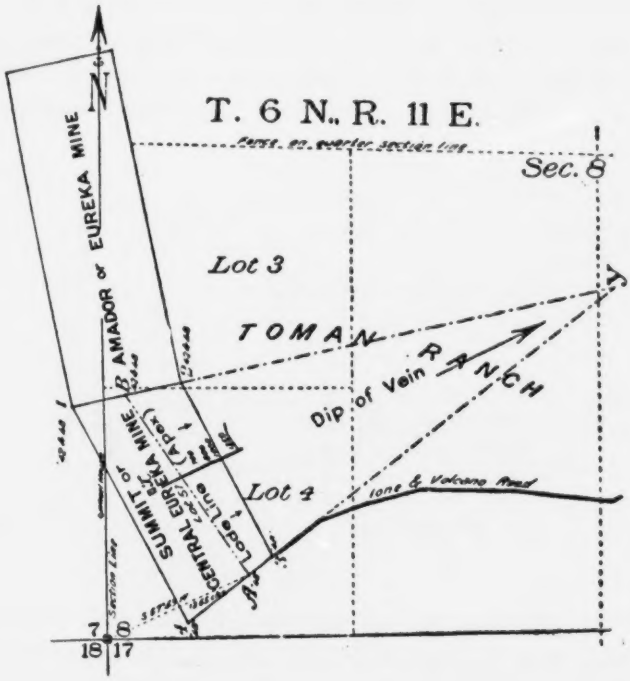
> "Thus, the patent which determined that the Ames Tract was agricultural applied only to the surface of the land *and that portion of the subsurface not already subject to existing extralateral rights.*" (R. 377.)

The language of the opinion which immediately follows also shows clearly that, *except for "existing extralateral rights"* petitioners are held by the California Court to be the owners of *"the subsurface mineral land* of the Ames tract" by virtue of the railroad patent.

THIS COURT HAS ALREADY DECIDED THE MAJOR ISSUE IN FAVOR OF RESPONDENT AND ALL OF THE AUTHORITIES SUPPORT THIS HOLDING.

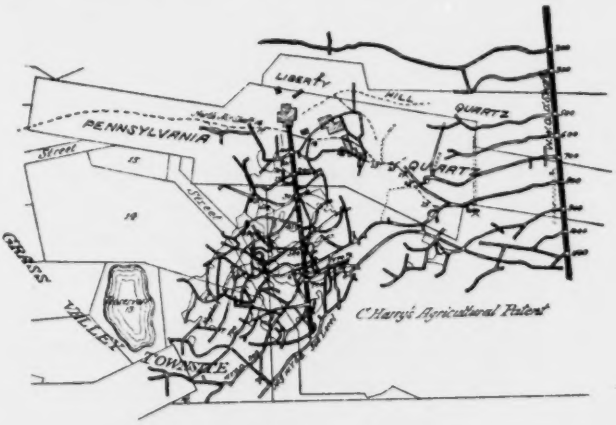
The case of *East Central Eureka M. Co. v. Central Eureka M. Co.*, 204 U. S. 266 involved a lode mining claim located in 1863. Mining patent issued November 25, 1873, after the passage of the Mining Act of 1872. This Court

upheld the right of the mining claimant to follow the vein extralaterally beneath the surface of the adjoining "Toman Ranch", patented as agricultural land. (The illustrative diagram, p. 1272, *Lindley on Mines,* 3rd Ed. §574 is here reproduced.) This Court said that the part of



the vein under the agricultural patented Toman Ranch "was embraced in the (mining) patent to plaintiff" and "*severed from the surface*" of the agricultural patent. (204 U. S. at p. 272.) If petitioners are correct in their contention that a non-mineral patent to land conveys not only the surface, but everything vertically beneath the surface, including the extralateral segment of a vein penetrating such

subsurface, then petitioners must also contend that this Court erroneously decided the *Central Eureka* case. That case standing alone is a complete answer to the preposterous contention that the mining law was intended by Congress to be in force only as between mining claimants. (Petion, 16, 29.) See *Pennsylvania M. Co. v. Grass Valley M. Co.*, 117 Fed. 509, 516, where the right of a mining claimant to follow his vein beneath patented agricultural land was also upheld. (Illustration of that case is on p. 1483, *Lindley on Mines* and is here reproduced.) (See also *Paterson v.*



Ogden, 141 Cal. 43, 45, *Amador Median Co. v. South Spring Hill Co.*, 36 Fed. 668, 670; *Pacific Coast Co. v. Spargo*, 16 Fed. 348, 349, 350; *Anaconda Copper M. Co. v. Pilot Butte M. Co.* (Mont.), 156 Pac. 409, 412; *Reeves v. Oregon Exploration Co.*, (Ore.) 273 Pac. 389, 390-1, to the same effect.)

The text writers also unanimously support the doctrine that where the location of a mining claim embracing the apex of the vein antedates an agricultural patent beneath which the vein dips, the mine owner owns the extralateral

vein segment which is severed from the surface of the overlying land.

Lindley on Mines (3rd Ed.) §612;
Costigan on Mining Law, p. 450;
Ricketts, American Mining Law, §§172, 945;
Morrison's Mining Rights (16th Ed.), p. 210;
Snyder on Mines, p. 658, §760, p. 766, §865;
Martin on Mining Law, p. 236;
Kenny, The Law of the Apex, pp. 210-214.

THE CASE OF BRODER v. NATOMA WATER CO., 101 U. S. 274, IS DECISIVE OF THE FACT THAT MINING RIGHTS POSSESSED AND ACQUIRED PRIOR TO RAILROAD GRANTS ARE CARVED OUT OF AND RESERVED FROM THE OPERATION OF RAILROAD PATENTS.

In that case a mining ditch had been constructed in 1853. Railroad grants were enacted by Congress in 1862 and 1864 and railroad patent for the land over which the ditch was located issued June 27, 1867. (See case below, 50 Cal., 621, 622.) The mining ditch was, therefore, located across the land prior to any Congressional enactment, just as here the Pennsylvania vein apex was located prior to the Railroad Act of July 25, 1866. In the *Broder* case the right to the mining ditch was confirmed by §9 of the Mining Act of 1866. Sections 2 and 4 of the same act confirmed the miners' right to locate and follow the Pennsylvania-Jefferson vein extralaterally. This Court said in the *Broder* case at p. 276 that the

> "rights of miners, who had taken possession of mines and worked and developed them" (are analagous to) "the rights of persons who had constructed canals and ditches to be used in mining operations * * *."

These rights the government

> "was bound to protect, before the passage of the (mining) act of 1866." (Which act) "was rather a voluntary recognition of a *pre-existing right* * * * rather than the establishment of a new one." (101 U. S. at p. 276.)

See also to the same effect:

Central Pacific Ry. v. Alameda Co., 284 U. S. 463, 468, 471;

Cramer v. United States, 261 U. S. 219, 229.

THE CERTIFICATE OF FINAL ENTRY OF THE PENNSYLVANIA MINE ANTEDATED THE RAILROAD PATENT BY 15 DAYS.

On May 31, 1880, Final Certificate of Entry for the Pennsylvania Mine was issued. (R. 252.) This Court has held this Final Certificate to be the equivalent of patent.

El Paso Brick Co. v. McKnight, 233 U. S. 250, 257.

On the other hand the railroad patent was subject to the initiation of valid mineral claims and rights up to the very date of its issuance. (June 14, 1880.)

Barden v. N. P. R. R., 154, U. S. 288, 311-3;

N. P. R. R. v. Sanders, 166 U. S. 620, 633-4;

Lindley on Mines (3rd Ed.) §154, p. 289.

Upon this very simple and valid ground the California District Court of Appeals based its decision in this case.

Ames v. Empire Star Mines Co. (Cal. App.) 93 Pac. (2d) 635, 641.

There is, therefore, not only priority of location right in favor of respondent, but also priority of patent right.

SCHOOL LAND IN SECTION 16 WAS AT ALL TIMES SUBJECT TO THE RIGHT OF THE PENNSYLVANIA CLAIM OWNERS TO PURSUE THEIR VEIN EXTRALATERALLY BENEATH IT.

The same reasons which govern in the case of railroad lands also apply to the strip of state school land, 200 feet wide, owned by respondent, which intervenes between its Pennsylvania lode claim and the Ames railroad land. Congress never intended that minerals should pass under school land grants if the minerals were known to exist at the date of approval of the survey of the school section. The Pennsylvania mine was actively worked long prior to 1863. By 1867 when the official survey of Section 16, in which the mine is situated, was approved, the mine workings following down on the vein had penetrated entirely through the subsurface of this strip of school land and had entered the subsurface of the railroad land beyond. (R. 15-16; Findings of Fact, 12 and 13.) That a state patent to school land issued May 22, 1882, or two years later than the date of the patent to the Pennsylvania mine, could not operate to cut off the extralateral rights of the Pennsylvania mine see:

United States v. Sweet, 245 U. S. 563, 567-570;
West v. Standard Oil Co., 278 U. S. 200, 219;
Sliger Gold Mining Co., 56 L. D. 67, 71;
United States v. State of California, 55 L. D., 121, 129-130, 532, 538-540.

THE PENNSYLVANIA LODE MINING CLAIM, 1540 FEET IN LENGTH, WAS PATENTED PURSUANT TO THE MINING ACT OF 1866.

The petition (pp. 4, 30-1), erroneously states that "the California Supreme Court held that a claim *patented under the mining act of May 10, 1872* (17 Stat. 91) of

more than 1500 feet in length had extralateral rights". On the contrary, the Supreme Court of California definitely held that the patent to the Pennsylvania claim for 1540 feet was "issued in pursuance to the earlier act of July 26, 1866, on the basis of an earlier location". (R. 378.) The record bears this out. (R. 12-13.) The Mining Act of 1866 did not limit claims to 1500 feet in length. The Register's Final Certificate of Entry was issued "in pursuance of the Mining Act of Congress, approved July 26, 1866", etc. (R. 252.) Furthermore, the Pennsylvania claim was a consolidation of three claims. (R. 239-240, Finding of Fact, 3, R. 12.) This and other Courts have recognized as valid, mining claims located in the 1860's which were patented subsequent to the Mining Act of 1872, which far exceed 1500 feet in length. (*Lawson v. U. S. Mining Co.*, 207 U. S. 1, patent issued in 1877, claim over 5000 ft. in length; *Pennsylvania M. Co. v. Grass Valley Co.*, 117 Fed. 509, patent issued 1879, lode 2838 ft.; *Carson City M. Co. v. North Star M. Co.*, 73 Fed. 597, patent issued 1875, lode 3140 feet; *Wyoming Co. v. Champion Co.*, 63 Fed. 540, patent issued 1874 for Wyoming lode, 2270 ft., in 1880 for Ural lode 2000 feet.)

The Mining Act of 1872 repealed the Mining Act of 1866 §16 (17 Stat. 91), but provided that

> "nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

It also specifically provided:

> "That mining claims * * * *heretofore located*, shall be governed as to length along the vein or lode, by the customs, regulations and laws in force at the date of their location." Claims "located after the passage

of the Act * * * shall not exceed 1500 feet in length". §2320 U. S. Rev. Stats.)

THE REMAINING CONTENTIONS OF PETITIONERS DEAL WITH THE ADMISSIBILITY OF EVIDENCE UNDER THE LAWS OF CALIFORNIA. DECISION UPON THESE QUESTIONS WAS ADVERSE TO PETITIONERS IN THE TRIAL COURT AND THESE RULINGS WERE UPHELD BY THE CALIFORNIA SUPREME COURT. SUCH RULINGS MAY NOT BE MADE THE BASIS FOR GRANTING CERTIORARI HERE.

The rulings on admission of evidence and the findings of the trial court (R. 11-20) negative every adverse contention made by petitioners' counsel as to the dates and facts which establish the valid location of the Pennsylvania and Jefferson claims in conformity to the miners' "customs, regulations and laws in force at the date of their location". The Supreme Court affirmed these rulings on admission of evidence and findings of the trial court in its opinion. (R. 371, 379, 381.) Petitioners made no attempt to controvert any of this evidence. The assertion of counsel for petitioners that respondent's derraignment of title was insufficiently made (Petition, p. 42) is, moreover, contrary to their own stipulations made in open court. (R. 38-41.) Their statement that the trial court gave them "no opportunity to object to the admissibility of the documents abstracted * * *" (Petition, 37) is also contrary to the fact. The trial court gave them every opportunity for "checking over the record and making such objections as they are advised". (R. 41.)

Such evidentiary rulings and findings, even if erroneous, cannot be made the basis for certiorari from this Court:

Dower v. Richards, 151 U. S. 658, 663;

Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 222;

Chrisman v. Miller, 197 U. S. 313, 319;
Los Angeles Farming and Milling Co. v. Los Angeles, 217 U. S. 217, 226;
Chapman and Dewey Land Co. v. Bigelow, 206 U. S. 41, 45;
Barrington v. Missouri, 205 U. S. 483, 486, 487;
West v. Louisiana, 194 U. S. 258, 260;
Hughes, Federal Practice, Vol. 5, §§3257-3260.

THE DISSENTING OPINION.

Counsel rely heavily (Petition, 11-12, 15-16, 45) on the dissent of but one judge of the California Supreme Court where the case was given unusual and careful consideration. Many misstatements of both fact and law appear in the dissenting opinion which have already been covered by this reply. But the partisan and nonjudicial character of the dissenting opinion is best evidenced by its wholly unwarranted and intemperate criticism of the views of the other six justices who joined in the majority opinion. (R. 386, 390.)

THE EQUITIES.

The Pennsylvania and Jefferson claims were located and mined over 75 years ago. Workings on the dip of the vein had already extended beneath the surface of the Ames tract over 70 years ago. (R. 16.) Extensive mining on this vein has been carried on underneath Ames tract surface at various times since. This right to mine there had not been challenged during all these years until this suit was brought in 1937. Petitioners have not contributed one cent to the development of this vein and yet seek to

take this large investment from respondent after nearly three-quarters of a century has elapsed since these mining rights were initiated. They do so on the theory that away back in 1880 the nonmineral railroad patent took away from respondent's predecessor the property in the subsurface segment of the vein, and that such already known mineral rights became merged in the nonmineral patent to the surface. Respondent respectfully submits that the decisions to the contrary by the three California courts below are eminently fair and correct, that they are in thorough accordance with this Court's decisions and that they should not be disturbed.

Dated, San Francisco, California,
September 2, 1941.

ROBERT M. SEARLS,
WM. E. COLBY,
Attorneys for Respondent.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of September, 1941.*

_____

_____

Attorneys for Petitioners.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES and GERTRUDE AMES (husband and wife),

Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD. (a corporation),

Respondent.

PETITIONERS' REPLY BRIEF.

SIMEON E. SHEFFEY,
Merchants Exchange Building, San Francisco, California,

HERMAN WEINBERGER,
Merchants Exchange Building, San Francisco, California,

Attorneys for Petitioners.

RICHARD BELCHER,
Belcher Building, Marysville, California,

Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

	Page
The Issue	4
Facts of Location	5
Rights Created by Miners	8
Meaning of "Mineral Lands"	9
Cases Cited by Respondent (Br. 10) to Support Its Theory That Rights in Minerals in Railroad Lands Could Be Acquired up to Date of Patent Do Not Hold With Such Theory	10
Certificate of Entry	12
School Lands	12
Equities	13

Table of Authorities Cited

Cases	Pages
Barden v. N. P. R. R. Co., 154 U. S. 288	10
Belk v. Meagher, 104 U. S. 279	6
Burke v. S. P. R. R. Co., 234 U. S. 669	2, 9, 10
Cole v. Ralph, 252 U. S. 285	8
Deseret Salt Co. v. Tarpey, 142 U. S. 241	2, 10
East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266	11
East Central Eureka M. Co. v. Central Eureka M. Co., 146 Cal. 147	11
Fuller, Geo. A., v. Otis Elevator Co., 245 U. S. 489	3
Lee Doon v. Tesh, 68 Cal. 43	4
Mining Co. v. Tunnel Co., 196 U. S. 337	6
Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585	4
Postal Telegraph Co. v. Newport, 247 U. S. 464	4, 8
Pralus v. Jefferson G. & S. M. Co., 34 Cal. 558	8
Southern Pac. Co. v. Schuyler, 227 U. S. 601	4, 8
West v. Standard Oil Co., 278 U. S. 200	2, 10, 11
Wisconsin v. Price, 133 U. S. 496	2, 10

Texts	
Lindley, Mines (3d), Sec. 41	4
Lindley, Mines (3d), Sec. 53	8
Lindley, Mines (3d), Secs. 216, 219	6
Lindley, Mines (3d), Sec. 272	7

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 312

WORTHINGTON AMES and GERTRUDE AMES
(husband and wife),
Petitioners,

vs.

EMPIRE STAR MINES COMPANY, LTD.
(a corporation),
Respondent.

PETITIONERS' REPLY BRIEF.

In replying to respondent's brief, we wish to point out therein certain erroneous assumptions of fact, allusions to non-existent facts, and consequential misapplications of law.

Respondent offers six reasons for the denial of the petition herein. (Br. 1-2.) Our comments thereon are correspondingly numbered:

1. The decision of the California Supreme Court is not in conformity with state and federal decisions.

It is contrary to *Wisconsin v. Price,* 133 U. S. 496, and *Deseret Salt Co. v. Tarpey,* 142 U. S. 241, which are to the effect that a railroad grant is one *in praesenti,* taking effect as of the date of the act where the language of the act contains present words of grant. Nor is the decision in accord with the cases on the finality of a patent, or of the estate granted, particularly, *Burke v. S. P. R. R. Co.,* 234 U. S. 669; *West v. Standard Oil Co.,* 278 U. S. 200.

2. The decision does jeopardize railroad and state titles. Any decision which, contrary to established law, takes the property of one person and awards it to another jeopardizes titles. If the decision in question is correct, the holder of a railroad or agricultural patent never knows what his patent conveys. It would always remain a question of fact whether his patent conveyed the fee or surface rights only, dependent upon whether or not a mining claim had ever been located on or about it.

3. The fact that this matter received consideration by the District Court of Appeal, as well as the Supreme Court of the State of California, does not correct the error committed. The District Court of Appeal rendered its decision. Thereupon, the California Supreme Court granted a hearing. The California Supreme Court must have thought that the decision of the District Court of Appeal was not sound, at least it was not satisfied with it, otherwise the hearing would not have been granted. The California Supreme Court, in its decision, did not notice or comment on the decision of the District Court of Appeal.

The reasons upon which the two decisions are based are widely different (the decision of the District Court of Appeal is reported (93 Pac. (2d) 635)). Hence, there was not uniformity of view among the participating judges as to the law applicable to the case.

4. The decisions of any Court are entitled to their due weight and consideration, but this is no reason to follow an erroneous decision upsetting prior precedents of the United States Supreme Court and even prior decisions of the California Supreme Court itself.

5. Under its fifth reason, respondent states that our petition, brief and the dissenting opinion "contain many erroneous statements of both law and fact". If this is true, especially with reference to "erroneous statements of * * * fact", in all fairness, respondent should point out such erroneous statements. After making this charge, nowhere does respondent point out any erroneous statement of fact in either our petition, brief or the dissenting opinion. We believe the erroneous statements of fact are made by respondent as we shall hereinafter point out specifically.

6. By certiorari, the Supreme Court of the United States has the same power of review as if the case came before it on appeal.

Geo. A. Fuller v. Otis Elevator Co., 245 U. S. 489.

Where the question arises, if the basis of fact upon which the state Court rested its decision, denying

asserted federal rights, has any support in the record, it is the duty of the United States Supreme Court to review and correct the error.

Southern Pac. Co. v. Schuyler, 227 U. S. 601, 611;

Northern Pac. Ry. Co. v. North Dakota, 236 U. S. 585, 593;

Postal Telegraph Co. v. Newport, 247 U. S. 464, 473.

In the instant case, evidence incompetent was admitted and as admitted is insufficient to support the Court's findings.

THE ISSUE.

Under the heading "The True Issue", respondent states (Br. 5), that the real issue is "whether prior to June 14, 1880, title to the extralateral segment of the Pennsylvania vein had been acquired by respondent's predecessor so as to have been legally severed from the subsurface of the Ames tract and thus excepted from the patent to the railroad company".

This statement is merely a circumlocution. If the railroad company acquired a fee in the Ames land on July 25, 1866, and not merely surface rights, then it is clear that thereafter no one could acquire a right to mine in said land except from the owner thereof. If miners were trespassers on the public domain prior to July 26, 1866, as held by the authorities (Lindley, Mines (3d) Sec. 41, *Lee Doon v. Tesh,* 68 Cal. 43), and admitted by respondent (Br. 13),

such miners, prior to July 26, 1866, had not and could not acquire any rights in the public domain, and, hence, no rights in the Ames land. The California Supreme Court correctly treated the issue as one of priority of title, but erroneously decided it. The California Supreme Court said (R. 372):

> "The controversy turns upon the priority of title to the subsurface of the plaintiff's land."

The issue cannot be camouflaged; it is one of priority of title, and this priority is with petitioners' title. Petitioners' title is derived from a railroad grant made July 25, 1866, taking effect as of that date. Prior to that time, Congress had not authorized the disposal of mineral lands and, hence, prior to that time, miners had no right or title to such mineral lands.

FACTS OF LOCATION.

Respondent, seeking to avoid the issue of priority of title, omits and fails to meet our challenge that no proof of location, prior to 1866, was made of its claims. Under the heading "Restatement of Facts" (Br. 3), respondent says:

> "As early as 1863, both the Pennsylvania and Jefferson *locations* were in possession of and being worked by the then owners, etc."*

By what proof or authority may the Pennsylvania and Jefferson *possessions* in 1863 be spoken of as *loca-*

*All italics ours.

tions? When did they become *locations?* That is the question. Respondent's references to the record (Br. 3), in support of this statement *are references to evidence of possession only.* There is no reference to evidence of location, and the record contains no such evidence. The material fact bearing on the age of title of any mining claims is *location* and the date thereof. Possession without location is nothing, certainly not proof of location.

Belk v. Meagher, 104 U. S. 279, 284.

> "The right to the possession comes only from a valid location. Consequently, if there is no location there can be no possession under it. *Location does not necessarily follow from possession, but possession from location.* A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the act of Congress and the local laws and regulations."

Mining Co. v. Tunnel Co., 196 U. S. 337, 346:

> "*Location is the act or series of acts by which the right of exclusive possession* of mineral veins and the surface of mineral lands is vested in the locator. For this the only requirement made by Congress is the marking on the surface of the boundaries of the claim. By section 2324, however, Congress recognized the validity of any regulations made by the miners of any mining district not in conflict with the laws of the United States or the laws of the State or Territory within which the district is situated."

Lindley, Mines (3d), Sec. 216, 219.

Since respondent contends that its title goes back to locations made prior to 1863, such locations would

have to be under miners' rules and regulations. Where is the proof of what the rules and regulations were of Browns Valley Mining District? Judicial notice cannot be taken of such.

Lindley, Mines (3d), Sec. 272.

Where is the proof of what acts were done by way of location of the two mining claims in question? The record is silent. It contains no evidence of what the rules and regulations were of the Browns Valley Mining District, nor any evidence of any acts done by way of location. We do not contend that no location was ever made of respondent's Pennsylvania claim, but we do dispute the contention that location was made prior to July 25, 1866. The fact that a patent was issued for this claim establishes the fact of location, but since the form of the claims follows the form prescribed by the Act of 1872, it must be presumed, in the absence of other proof of location, that location was made with this Act in mind, and, hence, subsequent to its enactment.

As to respondent's Jefferson claim, the earliest location to which title is attached is that of F. W. Johnson made June 4, 1891. (R. 260.)

Respondent's statement based on findings 12 and 13 of the trial Court (R. 15, 16) that (Br. 3-4): "The mine workings * * * had penetrated beneath the subsurface of the Ames tract at or prior to July 25, 1866", is without any evidence to support it and is not true. "Defendant's Exhibit F3" (R. 284) states, that in 1867 the Pennsylvania mine was down 600 feet. The workings at this depth reached but did not penetrate the Ames land. (R. 152.) The Court

is not bound by findings which have no evidence in support thereof.

Southern Pac. Co. v. Schuyler, 227 U. S. 601, 611;

Postal Telegraph Co. v. Newport, 247 U. S. 464, 473.

Therefore, even if we assume that respondent's predecessors could gain any title by location under miners' customs prior to July 26, 1866, it has failed to prove any such location.

Location is a definite series of acts required to be done by miners' customs or by law.

Cole v. Ralph, 252 U. S. 285;

Pralus v. Jefferson G. & S. M. Co., 34 Cal. 558, 562.

We pointed out in our brief in support of our petition that there is a lack of proof of location prior to 1866. Respondent has not and cannot point to such proof of location because the record contains none.

Respondent, nevertheless, proceeds throughout its brief ignoring the lack of proof of location as if this were an admitted fact.

The Act of July 26, 1866, was the first act of Congress authorizing the sale of mineral lands, notwithstanding respondent's assertion to the contrary.

Lindley, Mines (3d), Sec. 53.

RIGHTS CREATED BY MINERS.

Respondent (Br. 6) speaks of "*The right created by the miners* in the early 1850's to follow the vein

extralaterally", etc., as if the miners had the right to dispose of the public domain. Respondent argues that Congress confirmed this right, though admitting that, prior to the Act of Congress of 1866, such miners were trespassers on the public domain. If such miners were trespassers they had no rights to confirm. Congress may have recognized, *good only among miners,* such rights as miners may have created among themselves, but in no way affecting the title of the United States or grantees of the United States. But, again, we call attention to the fact that no proof exists as to miners' rules or compliance therewith. Therefore, what the miners may have done generally "in the early 1850's", is purely academic in the case at bar.

MEANING OF "MINERAL LANDS".

We have no dispute with what respondent says (Br. 9-11) about the policy of Congress excluding "mineral lands" from grants to states and to railroads, but we do dispute the meaning applied to this term by respondent in the case at bar. Congress did not exclude *minerals in lands* apart from the lands themselves. Congress excluded only *mineral lands* for which other lands in lieu thereof could be granted. Congress did not exclude the subsurface of one parcel of land with the right to grant the subsurface of another parcel in lieu thereof. Congress did not attempt to define the term "mineral lands", but used it in its ordinary or popular signification.

Burke v. S. P. R. R. Co., 234 U. S. 669, 676.

CASES CITED BY RESPONDENT (Br. 10) TO SUPPORT ITS THEORY THAT RIGHTS IN MINERALS IN RAILROAD LANDS COULD BE ACQUIRED UP TO DATE OF PATENT DO NOT HOLD WITH SUCH THEORY.

Barden v. N. P. R. R. Co., 154 U. S. 288, is the case which lays down the rule that mineral lands within the place limits of railroad grants can be located up to date of patent. In the *Barden* case no patent had been issued, the finality of a patent was not involved. Nevertheless, the Court indicated (154 U. S. 228, 330-31) what its decision would have been if a patent had been involved. The question of finality of patent did arise and was answered in accordance with our contention in *Burke v. S. P. R. R. Co.,* 234 U. S. 669. If respondent's position is well taken, then every railroad or agricultural patent, or school land grant, must depend for finality upon a question of fact, viz., was a mining claim ever located on or about them. If so, such patent is subject to location and relocation again and again, and the owner of the patented land will never know until the end of time what his subsurface rights are, or what his patent conveyed. It certainly is not the policy of the law to have patented grants of the United States in such an unsettled condition.

Notwithstanding respondent's contention to the contrary, *Wisconsin v. Price,* 133 U. S. 496, and *Deseret Salt Co. v. Tarpey,* 142 U. S. 241, are apropos to the case at bar. The Ames land is a non-mineral tract, so determined by the issuance of patent, the patent relates back to the date of the grant and the estate granted is a fee. Also it is not true that *Burke v. S. P. R. R. Co.,* 234 U. S. 669, and *West v.*

Standard Oil Co., 278 U. S. 200, dealt only with surface conflicts. These cases dealt with the fee title in each instance just as fully as the fee is involved in the case at bar.

East Central Eureka M. Co. v. Central Eureka M. Co., 204 U. S. 266, does not militate against petitioners' contentions, but is in support thereof. In the *Eureka* case the title to the mining claim without question was granted first and subsequent thereto title to the agricultural land.

This case is reported in 146 Cal. 147, and at p. 151 the Court says:

> "The defendants own the adjoining land, known as the Toman Ranch, their title being derived through mesne conveyances from patents issued under the laws of the United States providing for the sale and disposition of agricultural lands, which patents were junior in point of time to the patent for the Summit Quartz Mine, and contained a reservation giving the right to the proprietor 'of a vein or ledge to extract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted'."

Respondent can get comfort out of this case only on the basis of an assumption of an unproved location under miners' rules and regulations prior to July 25, 1866, and by invoking a fallacious rule that Congress, after granting to the railroad company, could grant a second time to some one else, lands previously granted. The *East Central Eureka* case holds that when a grant has been made, it defeats

subsequent grants of the same land, the very thing petitioners contend for in the case at bar.

CERTIFICATE OF ENTRY.

Respondent asserts that the certificate of final entry issued for the Pennsylvania mine, May 31, 1880, was the "equivalent of patent". If this is so then we wish to point out that the railroad company had this "equivalent of patent" prior to May 31, 1880. The patent which covers the Ames land reads (R. 210):

> "Whereas certain tracts of land have been selected by Benjamin B. Redding, the Agent of the said 'Central Pacific Railroad Company', successor of the said 'California and Oregon Railroad Company' as shown by his original lists of selections, dated October 1 and 10 and Nov. 15, 1879, January 16, and April 22, 1880, and certified under dates of October 6 and 18, and November 21, 1879, January 20 and April 26, 1880, by the Registers and Receivers at Marysville and Shasta, California, and the President of the said Central Pacific Railroad Company has applied for a conveyance of the title to said lands granted by the aforesaid Acts of Congress to the said 'California and Oregon Railroad Company, its associates, successors and assigns'."

SCHOOL LANDS.

With reference to the school land title, respondent says (Br. 19), "Congress never intended that minerals

should pass under school land grants if the minerals were known to exist at the date of approval of the survey of the school section. The Pennsylvania was actively worked long prior to 1863." It is to be noted that respondent uses "minerals", instead of "mineral lands". It is the latter which is excluded in Congressional grants. Therefore, unless respondent has proved that its predecessors acquired from the United States title to the subsurface of the school lands prior to 1867, the state acquired the fee simple title on the date of the approval of the township and section survey, to-wit, August 6, 1867. (R. 115.)

EQUITIES.

When respondent comes to "The Equities", it has forgotten entirely that no evidence of location is in the record and states (Br. 22):

> (1) "The Pennsylvania and Jefferson claims were *located* and mined over 75 years ago."

This is a bold assertion, but with no evidence to support it.

> (2) "Workings on the dip of the vein had already extended beneath the surface of the Ames tract over 70 years ago."

This statement is simply not true. There is no proof or evidence to support it.

> (3) "This right to mine there had not been challenged during all these years until this suit was brought in 1937."

There is no evidence whatever in the record to support this statement.

> (4) "Petitioners have not contributed one cent to the development of this vein and yet seek to take this large investment from respondent after nearly three-quarters of a century has elapsed since these mining rights were initiated."

Does equity allow respondent or any one else to invade the property rights of another, merely because money has been spent to accomplish such invasion?

> (5) "They do so on the theory that away back in 1880 the non-mineral railroad patent took away from respondent's predecessor the property in the subsurface segment of the vein, and that such already known mineral rights became merged in the non-mineral patent to the surface."

This statement of petitioners' theory also is not true. We have stated our position very plainly many times, to-wit, Congress alone has power to dispose of rights in the public domain. On July 25, 1866, the Ames tract was *granted* to the railroad company. The grant was *in praesenti*. The grant made July 25, 1866, was confirmed by patent issued June 14, 1880. The patent was final and conclusive that the Ames tract was not within the mineral land exception of the granting act. The grant was of the fee and not merely of surface rights. Respondent's title to either of its claims could not antedate the first act of Congress, authorizing the disposal of mining land, to-wit, July 26, 1866. (14 Stat. 251.) Therefore, title to the Ames land having been granted to the railroad

company, Congress could not thereafter grant rights therein to some one else.

Therefore, petitioners respectfully submit that their petition is well taken and that certiorari should be granted as prayed.

Dated, San Francisco, California,
September 24, 1941.

Respectfully submitted,
SIMEON E. SHEFFEY,
HERMAN WEINBERGER,
Attorneys for Petitioners.

RICHARD BELCHER,
Of Counsel.